TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1280.

SYLVESTER PENNOYER, G. W. McBRIDE AND G. W. WEBB, APPELLANTS,

vs.

R. F. McCONNAUGHY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED SEPTEMBER 12, 1890.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1280.

SYLVESTER PENNOYER, G. W. McBRIDE AND G. W. WEBB, APPELLANTS,

vs.

R. F. McCONNAUGHY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

INDEX.

	Original.	Print.
Citation on appeal	1	1
Copy of citation on appeal	2	1
Bill of complaint	4	2
Subpœna *ad respondendum*	13	7
Marshal's return of service	14	8
Restraining order	16	9
Marshal's return of service of restraining order	17	9
Order for provisional injunction	21	10
Demurrer to bill	23	11
Order setting demurrer for hearing	28	12
Motion for leave to file amended bill	30	13
Order allowing filing of amended bill, &c.	33	14
Amended bill of complaint	35	14
Exhibit A—List of lands	43	19
Order overruling demurrer to amended bill	51	22
Opinion by the court	53	22
Petition for rehearing of demurrer	57	31
Motion for rehearing	61	33
Notice of motion for rehearing	63	33
Order setting demurrer for rehearing	65	34
Final decree	67	34
Opinion by the court on rehearing	74	37
Order allowing an appeal	77	41
Bond on appeal	79	42
Clerk's certificate	80	43

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 7, 1890.

1 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To R. F. McConnaughy, Greeting:

Whereas Sylvester Pennoyer, G. W. McBride, and G. W. Webb have lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. eighteen hundred and ninety, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this September 3, 1890.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 1708. U. S. circuit court, district of Oregon. R. F. McConnaughy *vs.* Sylvester Pennoyer, G. W. McBride, and G. W. Webb. Citation on appeal. Filed Sept. 4, 1890. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

DISTRICT OF OREGON, *ss:*

Due service of the within citation on appeal, at Portland, Oregon, on this 3d day of September, A. D. 1890, is hereby acknowledged by me as attorney for the within-named R. F. McConnaughy.

C. B. BELLINGER,
DOLPH, BELLINGER, MALLORY & SIMON,
Attorney for R. F. McConnaughy.

2 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

To R. F. McConnaughy, Greeting:

Whereas Sylvester Pennoyer, G. W. McBride, and G. W. Webb have lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. eighteen hundred and ninety, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Portland, in said district, this September 3, 1890.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 1708. U. S. circuit court, district of Oregon. R. F. McConnaughy *vs.* Sylvester Pennoyer, G. W. McBride, and G. W. Webb. Citation on appeal.

Endorsed: Filed Sept. 4, 1890. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

DISTRICT OF OREGON, *ss:*

Due service of the within citation on appeal, at Portland, Oregon, on this 3d day of September, A. D. 1890, is hereby acknowledged by me as attorney for the within-named R. F. McConnaughy.

C. B. BELLINGER,
DOLPH, BELLINGER, MALLORY & SIMON,
Attorney- for R. F. McConnaughy.

3 In the Circuit Court of the United States for the District of Oregon. April Term, 1890.

Be it remembered that on the 19th day of April, 1890, there was duly filed in the circuit court of the United States for the district of Oregon a bill of complaint, in words and figures as follows, to wit:

4 In the Circuit Court of the United States for the District of Oregon.

R. F. MCCONNAUGHY, Plaintiff,
vs.
SYLVESTER PENNOYER, G. W. MCBRIDE, and G. W. WEBB, Defendants.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

Comes now R. F. McConnaughy, a citizen of the State of California, and brings this his bill of complaint against Sylvester Pennoyer, G. W. McBride, and G. W. Webb, citizens and residents of the State of Oregon, and thereupon your orator complains and says:

I.

That he is a citizen of the State of California and that the defendants are citizens of the State of Oregon, and that said Sylvester Pennoyer is and during all the times herein mentioned was Governor of the State of Oregon; that said G. W. McBride is and during all the times herein mentioned was secretary of state of the State of Oregon, and the said G. W. Webb is and during all the times herein mentioned was the treasurer of the State of Oregon,

and that said three officers comprise the board of land commissioners for the sale of school and university lands under the laws of the State of Oregon.

II.

That heretofore and on the 12th day of March, 1860, the Congress of the United States passed and the President duly approved an act granting to the State of Oregon all the swamp and overflowed lands within said State; that heretofore and subsequent to the passage of said act the lands hereinafter mentioned and referred to were duly certified to the State of Oregon by the Secretary of the Interior as swamp and overflowed lands within the meaning of the said act.

III.

That on the 26th day of October, 1870, the Legislature of the State of Oregon, by its act duly passed, which act was approved by the Governor of the State, provided for the sale, among other things, of the said swamp and overflowed lands so enuring to the State of Oregon under the said act of Congress; that said last-named act provided, among other things, for the making and filing of maps and descriptions of the said swamp and overflowed lands in the different counties of the said State of Oregon and for the forwarding by the county clerks of the several counties of their official certificates to the land commissioner of the State of Oregon of the date on which said maps and descriptions were so filed, and that upon the receipt of such certificates it was made the duty of the said land commissioner to give public notice of said completion, approval, and filing for four weeks successively in some weekly newspaper published in such county; that said last-named act further provided that such swamp and overflowed lands should be sold by the commissioner representing the State at a price not less than one dollar per acre in gold coin to such persons as should file their applications therefor as provided for in said act; that it was further provided that within ninety days after the date of the public notice published as hereinbefore mentioned twenty per centum of the purchase-money should be paid by the applicant to the land commissioner, whose duty it then became under the said act to issue to the applicant a receipt therefor, and that the balance of such purchase-money should be paid upon proof of reclamation; that said act further provided for the proof of reclamation by the purchaser of said land within ten years from and after his first payment and for payment within such time of the residue of the purchase price of said land; that it was further provided in said act that in case the office of commissioner of lands was not created by law the provisions of said act of the Legislature should be executed by the board of commissioners for the sale of school and university lands for the State of Oregon.

IV.

That prior to the 18th day of October, 1878, one H. C. Owen had

regularly made application in pursuance of the said act of 1870 for the purchase of certain swamp and overflowed lands, among others, including the lands hereinafter mentioned and referred to; that thereafter and on the 23rd day of November, 1881, and on the 3rd day of April, 1884, and prior to the expiration of the ninety days from the date of public notice provided for in said act of 1870, the said H. C. Owen duly paid to the board of land commissioners for the sale of school and university lands of the State of Oregon the twenty per centum required by the said act of 1870 to be paid upon all the lands hereinafter mentioned; that all the lands so filed upon, paid for, and certificated are particularly mentioned and described in the exhibit hereto attached, marked Exhibit "A," which exhibit is made a part of this bill of complaint; that said lands aggregate 43,207.60 acres, and are situated in Lake county, Oregon.

V.

That about the 15th day of October, 1884, your orator purchased the said lands from one C. N. Felton, the grantee thereof from the said H. C. Owen, paying therefor to the said Felton above the sum of $30,000 and assuming to pay the residue of the purchase
7 price of said lands to the State of Oregon, and he is now occupying and using the same for the purposes of making hay and pasturage.

VI.

That on the 18th day of October, 1878, the Legislature of the State of Oregon passed and the Governor approved an act by which it was provided that all applications for the purchase of swamp and overflowed lands made previous to the passage of said act, which have not been regularly made in accordance with law or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, were declared void and of no force or effect whatever.

VII.

That heretofore and on the 16th day of February, 1887, the Legislature of the State of Oregon passed and the Governor approved an act by which it was provided that all certificates of sale issued by the board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom for swamp or overflowed lands on which the twenty per centum of the purchase price was not paid prior to January 17th, 1879, are hereby declared void and of no force or effect whatever, and the said act provided that said board of commissioners should be authorized and directed to cancel said certificates of sale.

VIII.

That said defendants, assuming to act as the board of land commissioners for the sale of school and university lands of the State

of Oregon, have cancelled the said certificates of sale so issued as aforesaid to H. C. Owen and through which your orator derives title to the lands aforesaid; that the said defendants have so as-
8 sumed as such board, pretending that the said certificates of sale to your orator were void under the said act of 1887, for the reason that the twenty per centum of the purchase price for said lands was not paid prior to the 17th day of January, 1879, the date on which the said act of October 18th, 1878, went into effect, although in fact such payment was made by said Owen prior to the expiration of the ninety days from the date of public notice provided for in the said act of 1870 of the completion, approval, and filing of the maps and descriptions covering the said lands hereinafter mentioned.

IX.

That on the 25th day of February, 1890, the said defendants, assuming to act as the board of land commissioners for the State of Oregon as aforesaid, made the following order:

"In the matter of the application of W. Z. Moss *et al.* to purchase certain swamp lands in the Warner Lake Valley, recently certified to the State by the Secretary of the Interior in list No. 12, Lakeview district, it was ordered that the said applications made in pursuance of the act approved Feb'y 16th, 1887, relating to swamp lands be accepted and that deeds be issued to lawful applicants for the lands described therein as far as the same shall appear in said certified list: Provided that no deed shall issue to any person but an actual settler till after the expiration of 90 days from the time said list was filed with the clerk of the board."

The said W. Z. Moss *et al.* mentioned in said order are applicants under the said act of 1887 to purchase from the said board certain of the lands hereinbefore mentioned belonging to your orator, and thereafter, during the month of April, 1890, so assuming to act, de-
9 fendants did pretend to sell about one thousand acres of the said lands of your orator, and did issue in the name of the State of Oregon deeds therefor to the persons purchasing the same; that a large number of applications for the purchase of the lands so belonging to your orator are on file in the office of said commissioners, and a large number of other persons are proposing, upon the expiration of the ninety days mentioned in the said order hereinbefore recited, to make application for the purchase of the said lands belonging to your orator.

X.

And your orator alleges and shows that the said defendants are without any authority to so sell and dispose of the lands of your orator; that the said act of the Legislative Assembly of the State of Oregon of 1887, declaring the certificates of purchase of swamp lands upon which the twenty per centum had not been paid prior to the going into effect of the said act of 1878, is void and of no force or effect as impairing the obligation of the contract which

your orator has with the State of Oregon for the purchase of said lands as hereinbefore set forth.

XI.

Your orator shows that heretofore and prior to the making of the said hereinbefore-recited order your orator protested to the said defendants so assuming to act as aforesaid against the sale of your orator's said lands; but such protests were wholly disregarded by them.

XII.

Your orator shows that, unless restrained therefrom, said defendants, assuming to act as a board of land commissioners as aforesaid, will, at the expiration of the said ninety days mentioned in the hereinbefore-recited order, proceed to sell the said lands of
10 your orator, and to execute as and for the State of Oregon deeds therefor, which acts, pretenses, and doings will operate to cloud your orator's title to the said lands and involve him in a great multiplicity of suits and to his wrong and irreparable injury in the premises.

XIII.

That said lands of your orator which said defendants propose to so sell and convey as aforesaid are of a value to exceed $50,000.

Wherefore your orator prays:

1. That the said defendants may be both preliminarily and perpetually restrained and enjoined from offering for sale or from selling any of the said mentioned and described lands of the plaintiff, or from executing or issuing for and in behalf of the State of Oregon or as the act of the board of land commissioners of the State of Oregon for the sale of school and university lands or otherwise any of the said mentioned lands.

2. And that your orator may have such other or further relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each and all of the matters and things in this bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph and they were specially interrogated thereunto severally—

May it please your honors, the premises considered, to grant unto your orator a writ of subpœna issuing out of and under the
11 seal of this honorable court, to be directed to the said defendants, Sylvester Pennoyer, G. W. McBride, and G. W. Webb, commanding them and each of them, by a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court, and then and there full, true, direct, and perfect

answer make to all and singular the premises; and, further, to stand to, perform, and abide by such further order or decree as to your honors shall seem meet, and also a writ of provisional and a writ of perpetual injunction to the same tenor, purport, and effect as is hereinbefore set forth and prayed.

And your orators will ever pray.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Complainant.

STATE OF OREGON, }
County of Multnomah, } *ss:*

C. B. Bellinger, the attorney of R. F. McConnaughy, the above-named complainant, being duly sworn according to law, on his oath saith that he has read the above bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the statements therein with reference to the possession of the lands mentioned therein and their value and as to complainant having protested against the sale of such lands, and as to such matters he believes it to be true.

C. B. BELLINGER.

Subscribed and sworn to before me this 19th day of April, 1890.
R. H. LAMSON, *Clerk,*
By MAURICE McKIM, *Deputy.*

Endorsed: Filed April 19, 1890. R. H. Lamson, clerk.

12 And afterwards, to wit, on the 21st day of April, 1890, there was issued out of said court a *subpœna ad respondendum* in words and figures as follows, to wit:

13 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY, Complainant,
vs.
SYLVESTER PENNOYER, G. W. McBRIDE, and G. W. WEBB, Defendants.

No. 1708. In Equity.
Subpœna ad Respondendum.

The President of the United States of America to Sylvester Pennoyer, G. W. McBride, and G. W. Webb, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of June next, which will be the 2nd day of June, A. D. 1890, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein R. F. McConnaughy is complainant and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in no-wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy, to make due service of this our writ of subpœna and to have then and there the same.

Hereof fail not.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 21st day of April, in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fourteenth.

Seal of U. S. Circuit Court for Oregon.

R. H. LAMSON, *Clerk*,
By MAURICE McKIM,
Deputy Clerk.

MEMORANDUM.—Pursuant to equity rule No. 12 of the Supreme Court of the United States the defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso.*

[Endorsed:] No. 1708. In the circuit court of the United States for the district of Oregon. In equity. R. F. McConnaughy *vs.* Sylvester Pennoyer, G. W. McBride, and G. W. Webb. *Subpœna ad respondendum.*

Endorsed: Returned and filed April 22, 1890. R. H. Lamson, clerk, by Maurice McKim, deputy clerk.

14 DISTRICT OF OREGON, *ss:*

I certify that on the 21st day of April, 1890, at Salem, Marion county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named Sylvester Pennoyer, Geo. W. McBride, and G. W. Webb, by exhibiting said writ to each of them and by delivering to each of them personally a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled action, duly certified to by the clerk of the circuit court for said district.

L. T. BARIN,
United States Marshal,
By P. B. SINNOTT, *Deputy.*

15 And afterwards, to wit, on the 21st day of April, 1890, there was duly filed in said court a restraining order in words and figures as follows, to wit:

16 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy
vs.
Sylvester Pennoyer, Geo. W. McBride, and G. W Webb. } No. 1708.

April 21, 1890.

Upon reading and filing the bill in the above-entitled cause, and hearing Mr. C. B. Bellinger, of counsel for the complainant, it is ordered that the above-named defendants do appear before this court, at the United States court-room, in Portland, in said district, on the tenth day after service upon said defendants of a copy of this order and a copy of the bill herein, if it be a court day, or else on the court day next following, at 10 o'clock a. m. of said day, then and there to show cause, if any, why a provisional injunction should not issue herein according to the prayer of the bill in that behalf.

And it is further ordered that upon the complainant giving to the defendants a bond, with sureties, in the sum of —— dollars, to be approved by the —— of this court, conditioned to pay the said defendants whatsoever damages and losses, not exceeding the sum of —— dollars, —— may sustain by reason of this order, if the same be wrongful or without sufficient cause, in the meantime and until the further order of the court herein the said defendants, —— ——, agents and servants, be, and they hereby are, severally restrained from doing any of the acts complained of in said bill.

(Signed) DEADY, *J.*

[Endorsed:] No. 1708. U. S. circuit court, district of Oregon. R. F. McConnaughy *vs.* Sylvester Pennoyer, Geo. W. McBride, and G. W. Webb. Restraining order.

Endorsed: Filed April 21, 1890. R. H. Lamson, clerk, by —— ——, deputy clerk.

17 *Return of Civil Process.*

United States of America, } *ss:*
District of Oregon, }

I hereby certify that on the 21st day of April, 1890, at Salem, Marion county, in said district, I duly served the within restraining order upon the therein-named Sylvester Pennoyer *and* by delivering to him personally a true copy of said restraining order, duly certified to by the clerk of the circuit court for said district.

L. T. BARIN,
United States Marshal,
By P. B. SINNOTT, *Deputy.*

18 *Return of Civil Process.*

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I hereby certify that on the 21st day of April, 1890, at Salem, Marion county, in said district, I duly served the within restraining order upon the therein-named Geo. W. McBride *and* by delivering to him personally a true copy of said restraining order, duly certified to by the clerk of the circuit court for said district.

L. T. BARIN,
United States Marshal,
By P. B. SINNOTT, *Deputy.*

19 *Return of Civil Process.*

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I hereby certify that on the 21st day of April, 1890, at Salem, Marion county, in said district, I duly served the within restraining order upon the therein-named G. W. Webb *and* by delivering to him personally a true copy of said restraining order, duly certified to by the clerk of the circuit court for said district.

L. T. BARIN,
United States Marshal,
By P. B. SINNOTT, *Deputy.*

20 And afterwards, to wit, on Friday, the 2d day of May, 1890, the same being the 10th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

21 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY
vs.
SYLVESTER PENNOYER, G. W. McBRIDE, and G. W. WEBB. } No. 1708.

MAY 2, 1890.

Now, at this day, this cause comes on to be heard upon the order to show cause why a provisional injunction should not issue herein, as prayed in the bill, the plaintiff appearing by Mr. C. B. Bellinger, of counsel. On consideration whereof it is ordered that a writ of provisional injunction issue commanding and enjoining the defendants, as in and by the bill herein prayed, from offering for sale or from selling any of the lands mentioned and described in said bill of complaint, or from executing or issuing for and in behalf of the State of Oregon or as the act of the board of land commissioners

of the State of Oregon for the sale of school and university lands or otherwise any of the said mentioned lands.

22 And afterwards, to wit, on the 29th day of May, 1890, there was duly filed in said court a demurrer to the bill in words and figures as follows, to wit:

23 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy, Complainant,
vs.
Sylvester Pennoyer, G. W. McBride, and G. W. Webb, Defendants. } No. 1708.

Demurrer of Sylvester Pennoyer, G. W. McBride, and G. W. Webb, defendants, to the bill of complaint of R. F. McConnaughy, the above-named complainant.

These defendants, Sylvester Pennoyer, G. W. McBride, and G. W. Webb, by protestation, not confessing all or any of the matters and things in complainant's bill of complaint contained to be true in such manner and form as the same is therein set forth and alleged, doth demur to the said bill of complaint, and for cause of demurrer do show—

I. That said bill of complaint doth not show any facts which entitles the complainant to maintain the same or to have the same considered by the court.

II. That it doth not appear that the defendants or either of
24 them have or had any direct or personal interest in the lands or any part thereof which are the subject-matter of the complainant's suit; but, on the contrary, they are sued in their official capacity as Governor, secretary of state, and State treasurer, respectively, of the State of Oregon, and that the lands described in the bill of complaint are part of the public domain of the State of Oregon, which State is not and cannot be made a party to this suit.

III. That this court hath not jurisdiction of the matters and things set forth in the bill of complaint nor any thereof, and cannot exercise jurisdiction thereover without violating article XI of the Constitution of the United States of America.

IV. That it does not appear from the matters and things set forth in the bill of complaint that the said bill is founded on fraud, accident, mistake, trust, specific performance, or any ground of equity jurisdiction, or that the said bill sets out any equity against the defendants or either of them whatever; but, on the contrary, it doth appear that the said bill is filed and brought to the attention
25 of the court for the purpose of having the court declare certain laws of the State of Oregon, which the defendants have sworn to obey, unconstitutional and void.

Wherefore, and for divers other good causes of demurrer appearing in said bill of complaint, the defendants do demur thereto and

humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to said bill of complaint, and pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

BRONAUGH, NORTHUP & McARTHUR,
Solicitors for Defendants.

STATE AND DISTRICT OF OREGON, } ss:
County of Multnomah, }

I, Lewis L. McArthur, do hereby certify that I am one of the solicitors for the defendants above named, and that in my opinion the foregoing demurrer is well founded in law.

LEWIS L. McARTHUR.

STATE OF OREGON, } ss:
County of Multnomah, }

Due and legal service of the foregoing demurrer, at Port-
26 land, Oregon, on this day by receiving a copy thereof duly certified to by L. L. McArthur, one of defendants' solicitors. Dated May 2, 1890.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Complainant.

Endorsed: Filed May 29, 1890. R. H. Lamson, clerk.

27 And afterwards, to wit, on Wednesday, the 9th day of July, 1890, the same being the 46th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

28 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY
vs. } No. 1708.
SYLVESTER PENNOYER *et al.*

JULY 9, 1890.

Now, at this day, comes the plaintiff, by Mr. Joseph Simon, of counsel, and the defendants, by Mr. Lewis L. McArthur, of counsel, and on motion of said plaintiff it is ordered that this cause be, and the same is hereby, set for hearing on the demurrer to the bill of complaint on Wednesday, July 16, 1890.

29 And afterwards, to wit, on the 25th day of July, 1890, there was duly filed in said court a motion for leave to file an amended bill, in words and figures as follows, to wit:

30 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy, Plaintiff,
vs.
Sylvester Pennoyer, G. W. McBride, and G. W. Webb, Defendants.

Now comes the plaintiff and moves the court for leave to amend his complaint herein by striking out all that part of subdivision IV of said complaint after the word "hereinafter," in line 1 of page 4 of the same, and inserting in lieu thereof the following words:

"Set forth and described in the exhibit hereto attached marked Exhibit "A," which exhibit is made a part of this amended bill of complaint, and upon such payment being made the said board of land commissioners duly executed a certificate of sale to said Owen for the said lands upon which the said payment of twenty per centum was so made; that said lands so paid for and certificated aggregate 43,207.60 acres and are situated in Lake county, Oregon."

Plaintiff also moves the court for leave to amend his said complaint by striking out the words in subdivision V thereof, beginning with the first line of said subdivision, "That about the 15 day of October, 1884, your orator purchased said lands from one C. N. Felton, the grantee thereof from the said H. C. Owen," and inserting in lieu of the said words so stricken out the following: "That about the 15 day of October, 1884, your orator purchased the said 43,207.60 acres of land, so certificated as aforesaid to said Owen, from one C. N. Felton, the grantee thereof from the said

31 Owen."

Plaintiff also moves for leave to amend his said complaint by inserting in subdivision IX thereof, after the word "orator," in line 19 of page six, the following words: "And acquired as aforesaid from said Felton."

Plaintiff also moves for leave to amend his said complaint by striking out in subdivision X the words, "which your orator has," in lines four and five on page seven of said complaint, and by adding at the end of said subdivision the words, "under which your orator's title is derived as aforesaid."

And plaintiff submits herewith an engrossed copy of said complaint with the proposed amendments incorporated therein.

DOLPH, BELLINGER, MALLORY and SIMON,
Solicitors for Plaintiff.

Endorsed: Filed July 25, 1890. R. H. Lamson, clerk.

32 And afterwards, to wit, on Friday, the 25th day of July, 1890, the same being the 53d judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

33 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy
vs.
Sylvester Pennoyer *et al.* } No. 1708.

July 25, 1890.

Now, at this day, comes the plaintiff, by Mr. Charles B. Bellinger, of counsel, and the defendants, by Mr. Lewis L. McArthur, of counsel, and on motion of said plaintiff it is ordered that he be, and he is hereby, allowed to file an amended bill herein and to attach thereto the exhibit now attached to the original bill, and that the demurrer of said defendants to the original bill stand as a demurrer to said amended bill.

34 And afterwards, to wit, on the 25th day of July, 1890, there was duly filed in said court an amended bill of complaint in words and figures as follows, to wit:

35 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy, Plaintiff,
vs.
Sylvester Pennoyer, G. W. McBride, and G. W. Webb, Defendants.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

Comes now R. F. McConnaughy, a citizen of the State of California, and brings this his amended bill of complaint against Sylvester Pennoyer, G. W. McBride, and G. W. Webb, citizens and residents of the State of Oregon, and thereupon your orator complains and says:

I.

That he is a citizen of the State of California and that the defendants are citizens of the State of Oregon, and that said Sylvester Pennoyer is and during all the times herein mentioned was Governor of the State of Oregon; that said G. W. McBride is and during all the times herein mentioned was secretary of state of the State of Oregon, and the said G. W. Webb is and during all the times herein mentioned was the treasurer of the State of Oregon, and that said three officers comprise the board of land commissioners for the sale of school and university lands under the laws of the State of Oregon.

II.

That heretofore and on the 12th day of March, 1860, the Congress of the United States passed and the President duly approved an act granting to the State of Oregon all the swamp and overflowed

lands within said State; that heretofore and subsequent to
36 the passage of said act the lands hereinafter mentioned and referred to were duly certified to the State of Oregon by the Secretary of the Interior as swamp and overflowed lands within the meaning of the said act.

III.

That on the 26th day of October, 1870, the Legislature of the State of Oregon, by its act duly passed, which act was approved by the Governor of the State, provided for the sale, among other things, of the said swamp and overflowed lands so enuring to the State of Oregon under the said act of Congress; that said last-named act provided, among other things, for the making and filing of maps and descriptions of the said swamp and overflowed lands in the different counties of the said State of Oregon and for the forwarding by the county clerks of the several counties of their official certificates to the land commissioner of the State of Oregon of the date on which said maps and descriptions were so filed, and that upon the receipt of such certificates it was made the duty of the said commissioner to give public notice of said completion, approval, and filing for four weeks successively in some weekly newspaper published in such county; that said last-named act further provided that such swamp and overflowed lands should be sold by the commissioner representing the State at a price not less than one dollar per acre in gold coin to such persons as should file their applications therefor as provided for in said act; that it was further provided that within ninety days after the date of the public notice published as hereinbefore mentioned twenty per centum of the purchase-money should be paid by the applicant to the land commissioner, whose duty it then became under the said act to issue to the applicant a receipt therefor, and that the balance of such purchase-money should be paid upon
37 proof of reclamation; that said act further provided for the proof of reclamation by the purchaser of said lands within ten years from and after his first payment and for payment within such time of the residue of the purchase price of said land; that it was further provided in said act that in case the office of commissioner of lands was not created by law the provisions of said act of the Legislature should be executed by the board of commissioners for the sale of school and university lands for the State of Oregon.

IV.

That prior to the 18th day of October, 1878, one H. C. Owen had regularly made application in pursuance of the said act of 1870 for the purchase of certain swamp and overflowed lands, among others including the lands hereinafter mentioned and referred to; that thereafter and on the 23rd day of November, 1881, and on the 3rd day of April, 1884, and prior to the expiration of the ninety days from the date of public notice provided for in said act of 1870, the said H. C. Owen duly paid to the board of land commissioners for the sale of school and university lands of the State of Oregon the

twenty per centum required by the said act of 1870 to be paid upon all the lands hereinafter set forth and described in the exhibit hereto attached, marked Exhibit "A," which exhibit is made a part of this amended bill of complaint, and upon such payment being made the said board of land commissioners duly executed a certificate of sale to said Owen for the said lands upon which the said payment of twenty per centum was so made; that said lands so paid for and certificated aggregate 43,207.60 acres and are situated in Lake county, Oregon.

V.

That about the 15th day of October, 1884, your orator purchased the said 43,207.60 acres of land so certificated as aforesaid to said Owen from one C. N. Felton, the grantee thereof, from the said Owen, paying therefor to the said Felton above the sum of $30,000, and assuming to pay the residue of the purchase price of
38 said lands to the State of Oregon, and he is now occupying and using the same for the purposes of making hay and pasturage.

VI.

That on the 18th day of October, 1878, the Legislature of the State of Oregon passed and the Governor approved an act by which it was provided that all applications for the purchase of swamp and overflowed lands made previous to the passage of said act which have not been regularly made in accordance with law or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, were declared void and of no force or effect whatever.

VII.

That heretofore and on the 16th day of February, 1887, the Legislature of the State of Oregon passed and the Governor approved an act by which it was provided that all certificates of sale issued by the board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom for swamp or overflowed lands on which the twenty per centum of the purchase price was not paid prior to January 17th, 1879, are hereby declared void and of no force or effect whatever, and the said act provided that said board of commissioners should be authorized and directed to cancel said certificates of sale.

VIII.

That said defendants, assuming to act as the board of land commissioners for the sale of school and university lands of the State of Oregon, have cancelled the said certificates of sale so issued as aforesaid to H. C. Owen, and through which your orator derives
39 title to the lands aforesaid; that the said defendants have so assumed as such board, pretending that the said certificates

of sale to your orator were void under the said act of 1887, for the reason that the twenty per centum of the purchase price for said lands was not paid prior to the 17th day of January, 1879, the date on which the said act of October 18th, 1878, went into effect, although in fact such payment was made by said Owen prior to the expiration of the ninety days from the date of public notice provided for in the said act of 1870 of the completion, approval, and filing of the maps and descriptions covering the said lands hereinafter mentioned.

IX.

That on the 25th day of February, 1890, the said defendants, assuming to act as the board of land commissioners for the State of Oregon as aforesaid, made the following order:

"In the matter of the application of W. Z. Moss *et al.* to purchase certain swamp lands in the Warner Lake Valley, recently certified to the State by the Secretary of the Interior in list No. 12, Lakeview district, it was ordered that the said applications made in pursuance of the act approved Feb'y 16th, 1887, relating to swamp lands, be accepted, and that deeds be issued to lawful applicants for the lands described therein, as far as the same shall appear in said certified list: Provided, That no deed shall issue to any person but an actual settler till after the expiration of 90 days from the time said list was filed with the clerk of the board."

The said W. Z. Moss *et al.* mentioned in said order are applicants under the said act of 1887 to purchase from the said board certain of the lands hereinbefore mentioned belonging to your orator and acquired as aforesaid from said Felton; and thereafter, during the month of April, 1890, the defendants, so assuming to act, did pretend to sell about one thousand acres of the said lands of your orator and did issue in the name of the State of Oregon deeds therefor to the persons purchasing the same; that a large number of applications for the purchase of the lands so belonging to your orator are on file in the office of said commissioners and a large number of other persons are proposing, upon the expiration of the ninety days mentioned in the said order hereinbefore recited, to make application for the purchase of the said lands belonging to your orator.

X.

And your orator alleges and shows that the said defendants are without any authority to so sell and dispose of the lands of your orator; that the said act of the Legislative Assembly of the State of Oregon of 1887 declaring the certificates of purchase of swamp lands upon which the twenty per centum had not been paid prior to the going into effect of the said act of 1878 is void and of no force or effect as impairing the obligation of the contract with the State of Oregon for the purchase of said lands, as hereinbefore set forth, under which your orator's title is derived as aforesaid.

XI.

Your orator shows that heretofore and prior to the making of the said hereinbefore-recited order your orator protested to the said defendants, so assuming to act as aforesaid, against the sale of your orator's said lands, but such protests were wholly disregarded by them.

XII.

Your orator shows that unless restrained therefrom said defendants, assuming to act as the board of land commissioners as aforesaid, will at the expiration of the said ninety days mentioned in the hereinbefore-recited order proceed to sell the said lands
41 of your orator and to execute as and for the State of Oregon deeds therefor, which acts, pretenses, and doings will operate to cloud your orator's title to the said lands and involve him in a great multiplicity of suits and to his wrong and irreparable injury in the premises.

XIII.

That said lands of your orator which said defendants propose to so sell and convey as aforesaid are of a value to exceed $50,000.

Wherefore your orator prays:

1. That the said defendants may be both preliminarily and perpetually restrained and enjoined from offering for sale or from selling any of the said mentioned and described lands of the plaintiff or from executing or issuing for and in behalf of the State of Oregon or as the act of the board of land commissioners of the State of Oregon for the sale of school and university lands or otherwise any of the said mentioned lands.

2. And that your orator may have such other or further relief in the premises as the nature of the case may require and as shall be agreeable to equity and good conscience.

To the end, therefore, that the said defendants may, if they can, show why your orator should not have the relief hereby prayed and may, according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to each and all of the matters and things in this amended bill of complaint contained, and that as fully and particularly as if the same were here repeated paragraph by paragraph and they were specially interrogated thereunto severally—

May it please your honors, the premises considered, to grant unto your orator a writ of subpœna issuing out of and under the
42 seal of this houorable court, to be directed to the said defendants, Sylvester Pennoyer, G. W. McBride, and G. W. Webb, commanding them and each of them, by a certain day and under a certain penalty to be therein inserted, to appear before your honors in this honorable court and then and there full, true, direct, and perfect answer make to all and singular the premises, and, further, to stand to, perform, and abide by such further order or decree as

to your honors shall seem meet, and also a writ of provisional and a writ of perpetual injunction to the same tenor, purport, and effect as is hereinbefore set forth and prayed.

And your orators will ever pray.

DOLPH, BELLINGER, MALLORY & SIMON,
Solicitors for Complainant.

STATE OF OREGON,
County of Multnomah, } ss:

C. B. Bellinger, the attorney of R. F. McConnaughy, the above-named complainant, being duly sworn according to law, on his oath saith that he has read the above amended bill of complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the statements therein with reference to the possession of the lands mentioned therein and their value and as to complainant having protested against the sale of such lands, and as to such matters he believes it to be true.

C. B. BELLINGER.

Subscribed and sworn to before me this 25th day of July, 1890.
[SEAL.] VICTOR C. BELLINGER,
Notary Public for Oregon.

Endorsed: Filed July 25, 1890. R. H. Lamson, clerk.

43 EXHIBIT "A."

All of	Sec.	1,	T. 39 S.,	R. 24 E.	640.00 acres.
All of	"	2,	"	24	640.00 "
East half and east half of west half, except lots one, two, three, and four	"	3,	"	"	313.55 "
East half of southeast quarter of	"	9,	"	"	80.00 "
All except lot one of	"	10,	"	"	610.38 "
All of	"	11,	"	"	640.00 "
All of	"	12,	"	"	640.00 "
All of	"	13,	"	"	640.00 "
All of	"	14,	"	"	640.00 "
North half and southeast quarter, except lots one, two, and three	"	15,	"	"	382.60 "
East half, except lots one, two, three, and four of	"	22,	"	"	224.20 "
All of	"	23,	"	"	640.00 "
All of	"	24,	"	"	640.00 "
All of	"	25,	"	"	640.00 "
All of	"	26,	"	"	640.00 "
East half of east half, except lots one, two, three, and four of	"	27,	"	"	105.50 "
Southeast quarter and southeast quarter of southwest quarter, except lots one, two, three, and four	"	29,	"	"	70.13 "
Southeast quarter and southeast quarter of northeast quarter, except lots one, two, and three of	"	31,	"	"	132.10 "
44 All except lot one of	Sec.	32,	T. 39 S.,	R. 24 E.	597.86 acres.
All except lots one, two, three, and four of	"	33,	"	"	595.10 "
All except lots one, two, and three of	"	34,	"	"	553.19 "
All of	"	35,	"	"	640.00 "

West half, except lots one, two, three, and four of	Sec.	4,	T. 38 S.,	R. 25 E.	240.20	acres.
All of	"	5,	38	"	640.00	"
All of	"	6,	"	"	640.00	"
All of	"	7,	"	"	640.00	"
All of	"	8,	"	"	640.00	"
West half, except lots one, two, three, and four of	"	9,	"	"	191.30	"
All of	"	17,	"	"	640.00	"
All of	"	18,	"	"	640 00	"
All of	Sec.	19,	T. 38 S.,	R. 25 E.	640.00	acres.
All except lot one of	"	20,	"	"	640.84	"
West half of southeast quarter, south half of northwest quarter, and southwest quarter of	"	5,	40	"	360.00	"
All except lots one, two, three, four, five, six, seven, and eight of	"	6,	"	"	390.92	"
North half except lots one, two, three, four, five, and six of	"	1,	"	24	89.57	"
Southwest quarter of southwest quarter of	"	1,	"	"	40.00	"
All except lots one, two, three, four, five, six, seven, eight, and nine of	"	2,	"	"	411.00	"
45 All of	Sec.	3,	T. 40 S.,	R. 24 E.	624.00	acres.
All of	"	4,	"	"	640.00	"
All of	"	5,	"	"	640.00	"
East half, east half of southwest quarter, and southwest quarter of northwest quarter, except lots one, four, five, and six of	"	6,	"	"	232.92	"
East half and southwest quarter of	"	7,	"	"	480.00	"
East half of northwest quarter, southwest quarter of northwest quarter, except lots one, two, and three of	"	7,	"	"	70.86	"
All of	"	8,	"	"	640.00	"
All of	"	9,	"	"	640.00	"
All of	"	10,	"	"	640.00	"
West half of west half, except lots one, two, three, and four	"	11,	"	"	65.55	"
All except lots one, two, three, four, five, six, and seven of	"	15,	"	"	476.41	"
All of	"	17,	"	"	640.00	"
All of	"	18,	"	"	640.00	"
East half, except lots one, two, and three of	"	19,	"	"	265.05	"
All of	"	20,	"	"	640.00	"
East half of east half, southwest quarter of northeast quarter, and west half of southeast quarter	"	25,	"	"	280.00	"
46 North half of northwest quarter, southwest quarter of northwest quarter, except lots one and two of	Sec.	28,	T. 40 S.,	R. 24 E.	41.75	acres.
Northeast quarter and north half of northwest quarter, except lots one, two, three, and four of	"	29,	"	"	108 00	"
West half and west half of east half	"	19,	39,	25,	480.00	"
West half and west half of east half	"	30,	"	"	480.00	"
West half and west half of east half	"	31,	"	"	480.00	"
Northwest quarter and northwest quarter of southwest quarter, except lots one, two, three, and four of	"	21,	38,	"	90.11	"
Southeast quarter of southeast quarter	"	29,	"	"	40.00	"
West half and west half of east half, excepting lots one, two, three, four, five, and six of	"	30,	"	"	308.34	"
All except lot one of	"	"	"	"	620.70	"

All except lots one, two, three, four, five, and six of	Sec.	31,	T. 38 S.,	R. 25 E.	458.37	acres.
South half of	"	1,	"	"	320.00	"
All of	"	12,	"	"	640.00	"
All of	"	13,	"	"	640.00	"
South half of	"	23,	"	"	320.00	"
47 East half of southeast quarter	Sec.	22,	T. 38 S.,	R. 25 E.	80.00	acres.
All of	"	24,	"	"	640.00	"
All of	"	25,	"	"	640.00	"
All of	"	26,	"	"	640.00	"
East half of	"	27,	"	"	320.00	"
East half of	"	34,	"	"	320.00	"
All of	"	35,	"	"	640.00	"
West half, except lots one and two	"	28,	37	25	271.76	"
All except lots one, two, and three of	"	29,	37	"	576.52	"
All except northeast quarter of northwest quarter and northwest quarter of northeast quarter and lots one, two, three, and four and S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	"	30,	"	"	449.83	"
East half and east half of west half	"	31,	"	"	480.00	"
All of	"	32,	"	"	640.00	"
West half and southeast quarter, except lots one, two, three, and four	"	33,	"	"	408.80	"
West half of west half, except lots one, two, three, and four of	"	19,	2	"	44.32	"
West half and west half of east half	"	5,	41	"	480.00	"
East half of	"	6,	"	"	320.00	"
East half of east half and northwest quarter of northeast quarter	"	7,	41	"	200.00	"
48 West half and west half of east half	Sec.	8,	T. 41 S.,	R. 25 E.	480.00	acres.
West half of east half, northwest quarter, and northeast quarter of southwest quarter	"	17,	"	"	360.00	"
West half, north half of northeast quarter, and southwest quarter of northeast quarter of	"	4,	40	23	462.36	"
East half, northwest quarter, and northeast quarter of southwest quarter of	"	5,	"	"	520.16	"
South half of southeast quarter	"	7,	"	"	80.00	"
Northeast quarter of	"	18,	"	"	160.00	"
South half of northwest quarter and southwest quarter of	"	4,	"	22	240.00	"
South half of northeast quarter, southeast quarter, southeast quarter of northwest quarter, and east half of southwest quarter	"	5,	"	"	360.00	"
East half, southwest quarter, and east half of northwest quarter of	"	8,	"	"	560.00	"
West half of southwest quarter and southwest quarter of northwest quarter of	"	15,	"	"	120.00	"
East half and east half of west half and northwest quarter of northwest quarter of	"	17,	"	"	520.00	"
Northeast quarter of	"	20,	"	"	160.00	"
49 West half and southwest quarter of southeast quarter of	Sec.	9,	T. 40 S.,	R. 22 E.	360.00	acres.
North half southwest quarter and north half of southeast quarter of	"	21,	"	"	560.00	"
West half of northwest quarter and northwest quarter of southwest quarter of	"	22,	"	"	120.00	"
West half of west half, except lots one, two, three, and four of	"	6,	39	25	17.81	"

Southwest quarter, west half of southeast quarter, west half of northwest quarter, southeast quarter of northeast quarter, except lots one, two, three, and four	Sec. 7,	T. 39 S.,	R. 25 E.	231.32 acres.
All except lots one and two of	" 18,	"	"	543.80 "
The total containing				43,207.60 "

50 And afterwards, to wit, on Monday, the 28th day of July, 1890, the same being the 54th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

51 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY
vs.
SYLVESTER PENNOYER, GEORGE W. McBRIDE, and G. W. WEBB. } No. 1708.

JULY 28, 1890.

This cause was heard upon the demurrer to the amended bill and was argued by Mr. Charles B. Bellinger, of counsel for the plaintiff, and by Mr. Lewis L. McArthur, of counsel for the defendants; on consideration whereof it is ordered and adjudged that said demurrer be, and the same is hereby, overruled, and that said defendants be allowed ten days from this date in which to answer said amended bill.

52 And afterwards, to wit, on the 28th day of July, 1890, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

53 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY
v.
SYLVESTER PENNOYER, GEORGE W. McBRIDE, G. W. WEBB. } No. 1708.

Suit for an Injunction.

MONDAY, *July* 28, 1890.

(1.) Suit against a State.—A suit by a citizen of California to enjoin the persons constituting the board of land commissioners of the State of Oregon from selling certain swamp lands claimed by the plaintiff as forfeited to the State for non-compliance with a condition of a former sale of the same lands by the State to the plaintiff's grantor is not a suit against the State

of Oregon, it appearing that the legislation under which the defendants claim the right to act is unconstitutional and void, because it impairs the obligation of the contract of the State with such grantor.

(2.) Contract for sale of swamp lands.—An application for the purchase of swamp lands under § 3 of the act of October 26, 1870, for the "selection and sale" of swamp lands from the date of its receipt and filing by the land commissioner constitutes a contract between the State and the applicant for the sale to the latter of the tract or tracts therein mentioned, with the right to the immediate possession thereof, and on the performance of the conditions subsequent of payment and reclamation, within the terms and requirements of said section, the applicant or his assigns is entitled to a patent therefor.

Statutes of October 18, 1878, and February 16, 1887.—Section 9 of the act of 1878 does not, when fairly construed, include an application for the purchase of swamp land under the act of 1870, when there is no default in the payment of the 20 per centum of the purchase price as provided in said act of 1870; but if it does include such a case, then it is unconstitutional and void, as impairing the obligation of the contract of the State with the applicant, which gave him until ninety days after the publication of the notice of the filing of the map of such lands in the office of the clerk of the county in which they lie to make such payment, and section 1 of the act of 1887, which declares all certificates of sale of swamp lands void on which the 20 per centum of the purchase price was not paid prior to January 17, 1879, is, in the case where the 20 per centum was paid when due, according to the contract of sale, whether before or after said day in 1879, unconstitutional and void for the same reason.

DEADY, *J.*:

By the act of March 12, 1860, Congress granted to the State of Oregon the swamp and overflowed lands within its border.

On October 26, 1870, the Legislature passed an act "providing for the selection and sale" of such lands. Ses. L., 54.

By this act it was made the duty of the Governor, as land commissioner, to select such lands by means of deputies, who were required to return their selections to the commissioner for examination. Upon the selections being made in any county the commissioner was required to make out, in duplicate, maps thereof, one copy of which was to be filed in the office of the clerk of such county, the date of which filing was to be certified by said clerk to the commissioner, and thereupon the latter was required to give notice of such selection and filing by publication in a weekly paper published in the county for four successive weeks.

The act also directed the commissioner to sell such lands at a price not less than $1 per acre in gold coin. Any citizen of the United States over 21 years of age might apply "for the purchase of any tract or tracts" of such lands by filing his application therefor with

the commissioner, who shall endorse thereon the date of such filing, describing the same by the "survey," or if no survey is made, then by fences, ditches, monuments, or other artificial or natural landmarks, and in case of adverse applicants for the same parcel of land the commissioner shall sell the same to the person whose application is first filed.

Within 90 days from the date of the notice aforesaid 20 per centum of the purchase-money must be paid to the commissioner, who shall "issue to the applicant a receipt therefor." The balance of said purchase-money shall be paid and proof of reclamation made within 10 years from said date, when a patent shall issue to the applicant; but in default of such proof and payment the land "shall revert to the State and the money paid thereon shall be forfeited."

On October 18, 1878, the Legislature passed an act providing for the selection, location, and sale of State lands and the management and disposition of the proceeds arising therefrom, including swamp and overflowed lands, and the express repeal of sundry acts relating thereto, not including the act of 1870. Ses. L., 41.

By this act the Governor was "appointed" land commissioner for the State, as he had been since 1862 by the act of October 15 of that year (Comp. 1874, p. 629), with power "to locate all the lands to which the State is entitled under the laws of the United States," and the board of commissioners for the sale of school and university lands were authorized to sell the swamp and overflowed lands theretofore or thereafter "selected," not exceeding 320 acres, to any one person, at not less than $1 per acre.

After providing at some length for the manner of applying for the purchase of swamp lands and the purchase and conveyance of the same, the act (§ 9) declares as follows:

"All applications for the purchase of swamp and overflowed lands * * * made previous to the passage of this act which have not been regularly made in accordance with law or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever."

On February 16, 1887, the Legisture passed an act entitled in part "to declare void certain certificates of sale and to forfeit certain lands" (Ses. L., 9), the first section of which declares as follows: "That all certificates of sale issued by the board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom for swamp or overflowed lands on which the 20 per centum of the purchase price was not paid prior to January 17, 1879, are hereby declared void and of no force or effect whatever; and said board of commissioners is hereby authorized and directed to cancel said certificates of sale." These certificates of sale are the receipts provided for in the act of 1870.

The date, January 17, 1879, mentioned in this section is the date of the act of 1878, plus the 90 days which elapsed before it took effect. Section 7 of this act provides: "All swamp or overflowed

lands reverting to the State under the provisions of this act shall be sold as provided in the act of 1878 relating to swamp lands."

This suit is brought by the plaintiff, a citizen of California, to restrain the defendants, citizens of Oregon, constituting the board of land commissioners of the State, to restrain them from selling certain swamp lands claimed by the plaintiff as having reverted to the State under section 1 of the act of 1887.

The cause was heard on a demurrer to the bill.

From the latter it appears that prior to October 18, 1878, Henry C. Owen had regularly applied, in pursuance of the act of 1870, for the purchase of certain swamp lands theretofore certified to the State by the Secretary of the Interior as swamp and overflowed under said act of 1860, including those now here claimed by the plaintiff; that thereafter, on November 23, 1881, and on April 3, 1884, and prior to the expiration of the 90 days from the date of the public notice provided for in the act of 1870, the said Owen duly paid to the board of land commissioners the 20 per centum required by said act on 43,207.60 acres of said lands, situate in Lake county, Oregon; that about October 15, 1884, the plaintiff purchased said last-mentioned lands from Charles N. Felton, the grantee of Owen, and now occupies the same for hay and pasturage, and that he paid Felton for said lands the sum of $30,000 and assumed to pay the State the remainder of the purchase price therefor when it becomes due; that said defendants, assuming to act as the board of land commissioners and pretending that the certificates of sale issued to Owen are void for the reason that the 20 per centum of the purchase price was not paid before January 17, 1879, have canceled the same and have ordered said lands to be sold under the act of 1887 as reverted to the State, and have actually sold about 1,000 acres thereof.

It is also alleged in the bill that the defendants are acting in this matter without authority of law; that the act of 1887, in so
54 far as it declares the certificates given on the sale of the lands claimed herein by the plaintiff because the 20 per centum of the purchase price was not paid prior to January 17, 1879, is void and of no effect because it impairs the obligation of the contract with the State, under which the plaintiff claims, for the sale of these lands, which are of the value of $50,000.

The demurrer to the bill is, in substance, that the suit is in effect one against the State, and therefore this court is without jurisdiction.

The question is this a suit against the State is the question in the case, and this involves the construction and validity of the State legislation on the subject.

If the legislation is invalid under which the defendants assume to act they do not represent the State. They are acting without its authority, without the authority of law, and are responsible for their acts as private individuals. On the other hand, if this legislation is valid they represent the State, and the suit, in substance and effect, is against the State. Such a suit is forbidden by the eleventh amendment to the Constitution of the United States, which declares "The judicial power of the United States shall not be construed to

extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State."

Fortunately, the law on this subject has been so carefully and explicitly laid down by the Supreme Court in numerous cases, from Osborne *v.* The Bank of the United States, 9 Whea., 738 (1824), down to Poindexter *v.* Greenhow, 114 U. S., 270; Allen *v.* B. & O. R'y Co., *id.*, 311 (1884); Hagood *v.* Southern, 117 U. S., 52 (1885); *In re* Ayers, 123 U. S., 443 (1887), that nothing remains for this court to do but to state the same and follow it.

In Cunningham *v.* Mason & Brunswick R'y Co., 109 U. S., 446, Mr. Justice Miller, after stating "that whenever it can be clearly seen that the State is an indispensable party to enable the court, according to the rules which govern its procedure, to grant the relief sought it will refuse to take jurisdiction," proceeds to classify the cases in which jurisdiction has been maintained. One of these, the second, is "where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defence is that he has acted under the order of the Government."

In this class of cases he says the defendant "is not sued as or because he is the officer of the Government, but as an individual, and the court is not ousted of jurisdiction because he asserts authority as such officer. To make out his defence he must show that his authority was sufficient in law to protect him."

In support of this proposition the justice cites a number of cases decided in that court, including the then recent case of U. S. *v.* Lee, 106 U. S., 196, in which the plaintiff below maintained an action to recover the possession of certain real property against persons claiming to occupy as the agent and under the authority of the United States, on the ground that the alleged authority, which consisted of a purchase at an alleged tax sale, was invalid.

In the able, and I think unanswerable, argument contained in the opinion of the Supreme Court by the late Mr. Justice Matthews in Poindexter *v.* Greenhow, *supra*, the question is thoroughly considered, in the light of all authorities, and the jurisdiction of the court unqualifiedly maintained.

The case was briefly this: On March 30, 1871, the Legislature of Virginia authorized the coupons of the funded debt of the State to be received in payment of taxes due thereto, and by subsequent legislation forbid their being so received.

The plaintiff in error and below regularly tendered the defendant, the collector of taxes, coupons in payment of his taxes, which were refused, and certain of his personal property was levied on for the same. The plaintiff then brought an action of detinue in a court of Virginia to recover his property, in which the defendant had judgment. From there the case was taken by a writ of error to the Supreme Court of the United States, where the judgment of the court below was reversed, and it was held that the legislation of Virginia forbidding these coupons to be received for taxes impaired the obligation of its contract with the plaintiff, and was therefore void; that as the plaintiff had paid his taxes by the tender of his coupons

the defendant had no authority of law to enforce other payment by the seizure of his property; that in so doing the defendant ceased to be an officer of the law and became a private wrong-doer, in which character he took and detained the property of the plaintiff.

In the course of the opinion (p. 288) it is said:

"The *ratio decidendi* in this class of cases is very plain. A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defence. He is bound to establish it. The State is a political corporate body, can act only through agents, and can command only by laws. It is necessary, therefore, for such a defendant, in order to complete his defence, to produce a law of the State which constitutes his commission as its agent and a warrant for his act. This the defendant in the present case undertook to do. He relied on the act of January 26, 1882, requiring him to collect taxes in gold, silver, United States treasury notes, national bank currency, and nothing else, and thus forbidding his receipt of coupons in lieu of money. That, it is true, is a legislative act of the government of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, for it cannot, and what it cannot do it certainly, in contemplation of law, has not done. The Constitution of the United States and its own contract, both irrepealable by any such an act on its part, are the law of Virginia, and that law made it the duty of the defendant to receive the coupons tendered in payment of taxes, and declared every step to enforce the tax, thereafter taken, to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character, and, confessing a personal violation of the plaintiff's rights, for which he must personally answer, he is without defence."

Further on (p. 291), after stating the difference in this respect between the government of a State, its agents, and the State itself, it is said:

"This distinction is essential to the idea of constitutional government. To deny it or blot it out obliterates the line of demarcation that separates constitutional government from absolutism, free self-government based on the sovereignty of the people from that despotism, whether of the one or the many, which enables the agent of the State to declare and decree that he is the State, to say '*L'Etal c'est moi.*' Of what avail are written constitutions whose bills of right for the security of individual liberty have been written, too often, with the blood of martyrs, shed upon the battle-field and the scaffold, if their limitation and restraints upon power may be overpowered with impunity by the very agencies appointed to guard, defend, and enforce them, and that, too, with the sacred authority of law, not only compelling obedience, but entitled to respect? And how else can these principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders who are the instruments of wrong whenever they interpose the shield of the State? The doctrine is not to be tolerated. The whole frame and scheme of the political

institutions of this country, State and Federal, protest against it. Their continued existence is not compatible with it. It is the doctrine of absolutism, pure, simple, and naked, and of communism, which is its twin—the double progeny of the same evil birth."

In Allen *v.* B. & O. R'y Co., *supra*, the court allowed a perpetual injunction against the auditor of public accounts and treasurer of the State of Virginia to prevent the enforcement of a tax by the seizure and sale of the plaintiff's property, for which coupons of the bonds of the State had been duly tendered and refused.

These cases go upon the theory that proceedings to enjoin the seizure and sale of property or for the recovery of the possession of the same when seized, to enforce the payment of a tax for which a valid tender has been made, are defensive in their nature in which the plaintiff does not seek to compel the State or its agent to do or perform any particular act, but to prevent the seizure and sale of his property by a person acting professedly on behalf of the State, but without the authority of law.

And that is this case exactly. The defendants, a board of commissioners for the sale of swamp lands, are assuming to sell certain of such lands as the property of the State. The plaintiff claims the lands under a contract of purchase from the State, and asks
55 to have the defendants enjoined from doing an unlawful act to his irreparable injury. The defendants claim that they are acting in obedience to an act of the Legislature, which the plaintiff maintains is unconstitutional and void.

If the legislation under which the defendants assume to act is valid—an act of the State of Oregon—then the defendants stand for and represent the State, which, although not a party on the record, is in substance and effect the real defendant, and therefore the suit is forbidden by the eleventh amendment; otherwise not.

And before proceeding to consider this question it may be well to suggest that in this matter the defendants are not acting as Governor, secretary, and treasurer of the State, but simply as a board of commissioners for the sale of swamp lands belonging to the State.

The State constitution (art. 5, § 8) constitutes these persons by their title of office and during their continuance therein "a board of commissioners for the sale of school and university lands," and subsequently the Legislature devolved on them the additional duty of disposing of the swamp lands.

A qualified applicant for the purchase of swamp lands under the act of 1870 had a contract with the State for the sale and conveyance to him of the land specified in his application from the receipt and filing of the same, according to the terms and conditions mentioned in the act. McConnaughy *v.* Wiley, 33 Fed. Rep., 452.

The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal standing offer by the State of these lands for sale on the terms therein mentioned and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board and complying with the subsequent conditions of payment and reclamation.

The purchaser—the applicant—is entitled to enter into the possession of the land at once and commence the work of reclamation and cultivation and appropriate the products thereof to his own use. The application is a written acceptance of the offer of the State in relation to the land described therein, and on the filing of the same the minds of the seller and the purchaser—the State and the applicant—came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them until released therefrom by some substantial default of the other, not overlooked or excused. This contract, as soon as made—as soon as the acceptance of the offer of the State is filed—comes under the protection of that restraint on the power of the State which prohibits it from passing any law "impairing the obligation of contracts." U. S. Con., art. 1, § 10.

The experience of a century and more has demonstrated that but for this wholesome restraint on the action of State Legislatures a contract with a State would be subject to modification or recision with every whim of public opinion or gust of popular passion.

Section 1 of the act of 1887 is assumed in the bill as the legislation which impairs the obligation of this contract and under which the defendants are wrongfully attempting to sell this land. It expressly avoids all sales of swamp land on which the 20 per centum was not paid prior to January 17, 1879. This is broad enough to include the purchase by Owen, under which the defendants claim. But, as appears, the contract with Owen gave him ninety days after the publication of the notice in which to make this payment. This period had not expired on January 17, 1879, and before it did expire the 20 per centum was duly paid and accepted by the board.

It appears that the Legislature of 1887 undertook to annul this contract and require the certificates given the purchaser to be canceled on the ground that he had not complied with section 9 of the act of 1878 by paying the 20 per centum prior to January 17, 1879, the date when that act took effect.

But the act of 1878, fairly and reasonably construed, did not require such payment to be so made. It declared void and of no effect applications where the purchaser had not fully complied with "the terms and requirements of the law" under which they were made, "including the payment of the 20 per centum of the purchase price."

Counsel for the defendants insists that this act must be construed as requiring the payment of this 20 per centum prior to January 17, 1879, even if the same was not then due according to the terms of the sale as stated in the act of 1870. If this be so, then the act is so far void, because it impairs the obligation of the contract of sale, whereby the purchaser was to have until 90 days after the publication of notice to make the payment in without reference to when such publication should be made. The State had the right to make this publication whenever it was ready and to compel the payment within 90 days thereafter; but it had no power to require or compel the payment sooner than this and before it was due. This is a matter material to the purchaser. He ought not to be required to

make this payment before it is due, and every moment of time which the law gives him to make the payment in prolongs by *the* so much the expiration of the succeeding ten years within which he may reclaim the land and pay the balance of the purchase price.

But I do not think the act of 1878 ought to be so construed or that it will even bear such a construction. By its express terms it does not include any case except where there is a default on the part of the purchaser. The failure to pay the 20 per centum is included in the failure to comply with the terms and requirements of the law generally. It is not the mere non-payment of this per centum by a given day that is to have the effect to make void the application or the purchase, but the failure to do so when and as required by law, namely, within ninety days after the publication of the notice of filing the map. Any other construction of the section would not only be strained, but would impute to the Legislature a purpose to impair the obligation of the contract of the State with the purchaser, which ought not to be done if it can be avoided.

Prior to the passage of the act of 1887 the act of 1878 was not regarded as affecting sales where there had been no default in the payment of the 20 per centum or otherwise on the part of the purchaser or his assigns.

In an opinion delivered by the board of land commissioners some years before the passage of the former act, entitled "In the matter of the application of H. C. Owen for a certificate of purchase of certain swamp lands," it was held that the act of 1878 does not apply to a case where the period prescribed by the act of 1870 for the payment of the 20 per centum has not expired; and such, I understand, has been the uniform construction heretofore given to the act by the board.

The construction given to a statute by the executive or administrative officers of the Government charged with its execution is entitled to respectful consideration and ought not to be lightly overruled. Endlich, Interpretation of Statutes, § 360; U. S. *v.* Moore, 95 U. S., 763; Scanlan *v.* Childs, 33 Wis., 666; Westbrook *v.* Miller, 56 Mich., 151.

In conclusion, the act of 1878 does not authorize the board to treat this land as reverted to the State, because the 20 per centum of the purchase price was not paid before it took effect, and would be unconstitutional and void if it did. The per centum was duly paid and accepted by the board when it was due.

Section 1 of the act of 1887 is void and of no effect in the case of contracts like this, where this per centum was not due and payable prior to January 17, 1879.

This being so, the defendants are acting without the authority of law—without the authority of the State. They do not represent the State. The State is not a party to this suit either on the record or in substance or effect, and therefore the court has jurisdiction of the same as a suit between private persons who are citizens of different States.

The plaintiff is entitled to a perpetual injunction against the defendants and for costs.

Mr. Charles B. Bellinger, for the plaintiff.
Mr. Lewis L. McArthur, for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge.

Endorsed: Filed July 28, 1890. R. H. Lamson, clerk.

56 And afterwards, to wit, on the 9th day of August, 1890, there was duly filed in said court a petition for rehearing in words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy, Complainant,
vs.
Sylvester Pennoyer, George W. McBride, and G. W. Webb, Defendants.

Now, on this day, come the defendants above named and respectfully move and request this honorable court to grant to them a rehearing of the argument of their demurrer to the amended bill of complaint in this cause upon the following grounds:

First. The magnitude and grave importance of the principle involved in and which underlies this controversy cannot be overestimated in its bearing upon the question of the relative rights of sovereignty existing between the United States and the State of Oregon and the jurisdiction and powers of the officers of said governments, these defendants protesting and respectfully submitting that they are in nowise responsible or liable or amenable as individuals in the matters sought to be effected by this litigation, but affirming that defendant Sylvester Pennoyer is Governor of the State of Oregon, defendant George W. McBride is secretary of state of Oregon, and defendant G. W. Webb is treasurer of the State of Oregon, and that as such officers and not otherwise they are by the authority of the laws of said State of Oregon created a board of commissioners for the sale of school, university, and swamp lands belonging to said State, and that as such board of commissioners and not otherwise these defendants were and are by the act of the Legislature of said State entitled "An act to declare
58 void certain certificates of sale and to forfeit certain land; to authorize the cancellation of such certificates; to direct the repayment of moneys paid thereon; to preserve the rights of settlers on swamp lands; to authorize the institution of suits to cancel conveyances obtained by fraud, and to provide for the issuance of deeds to swamp lands without reclamation," approved February 16, 1887, required to discharge the duties imposed upon them by said legislation, the discharge of which duties constitutes the acts complained of in the plaintiff's bill of complaint.

Second. Since the argument was made and the decision of the court rendered upon the demurrer of defendants to said amended

bill of complaint defendants have been informed of a decision of the Supreme Court of the United States in the case of Hans *vs.* Louisiana, 134 U. S., 1, throwing further light upon the questions involved in this cause, and defendants are advised by their counsel, after due consideration of said decision when taken in connection with the previous decisions of said Supreme Court, that, in the opinion of counsel, the decision of this honorable court heretofore rendered overruling said demurrer is in conflict with said decisions of the Supreme Court in this, that it is held by that court that where the property or rights of the citizen of a State which are not dependent for their existence upon any contract between himself and another State are invaded or violated by officers of such other State under the claimed authority of an unconstitutional and void statute of such State such acts of such officers may be judicially resisted,
they being individually liable for such acts which are not
59 authorized by law; but that when the complainant's alleged
rights are claimed to be founded upon a contract entered into between himself and such other State, the obligation of which contract it is asserted is about to be impaired by acts of officers of such State done under the direction and supposed authorization of an unconstitutional law of such State, that in such case the State, being a party to the contract, is a necessary party to any litigation seeking directly a specific performance of such contract or seeking to obtain the same result indirectly by a suit to restrain the officers of the State from so violating such contract, and that inasmuch as the State cannot be sued without its consent such litigation cannot be maintained against its said officers.

Wherefore defendants pray to be heard by their counsel in this behalf.

E. C. BRONAUGH,
L. L. McARTHUR,
Solicitors for Defendants.

STATE OF OREGON,
County of Multonmah, } *ss:*

We hereby admit due and legal service to have been made upon us, in the above county and State, on this ninth day of August, A. D. 1890, of the within motion for rehearing, and hereby further admit — received a duly certified copy of said motion.

DOLPH, BELLINGER, MALLORY AND SIMON,
Solicitors for Complainant.

Endorsed: Filed August 9, 1890. R. H. Lamson, clerk.

60 And afterwards, to wit, on the 9th day of August, 1890, there was duly filed in said court a motion for rehearing in words and figures as follows, to wit:

61 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy, Complainant,
vs.
Sylvester Pennoyer, George W. McBride, and George W. Webb, Defendants.

Come now the undersigned, solicitors for the above-named defendants, and move the court to order a rehearing of the demurrer to the amended bill of complaint, and they base this motion upon the record in the case and upon the petition of the defendants, herewith filed.

E. C. BRONAUGH,
L. L. McARTHUR,
Solicitors for Defendants.

State of Oregon,
County of Multnomah, } *ss:*

We hereby admit due and legal service to have been made upon us, in the above county and State, on this ninth day of August, A. D. 1890, of the within motion for rehearing, and hereby further admit having received a duly certified copy of said motion.

DOLPH, BELLINGER, MALLORY and SIMON,
Solicitors for Complainant.

Endorsed: Filed August 9, 1890. R. H. Lamson, clerk.

62 And afterwards, to wit, on the 9th day of August, 1890, there was duly filed in said court a notice of motion for rehearing in words and figures as follows, to wit:

63 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy, Complainant,
vs.
Sylvester Pennoyer, George W. McBride, and George W. Webb, Defendants.

To the plaintiff in the above-entitled cause and to Messrs. Dolph, Bellinger, Mallory & Simon, his solicitors:

You and each of you will please take notice that the defendants, Sylvester Pennoyer, George W. McBride, and George W. Webb, will, on the fifteenth day of August, 1890, at the coming in of court on said day, or as soon thereafter as counsel can be heard, apply to the above-entitled court to set for hearing, at a day certain, the motion of the said defendants for a rehearing of the demurrer to the complainant's amended bill of complaint, said motion being based upon the petition herewith served.

E. C. BRONAUGH,
L. L. McARTHUR,
Solicitors for the Defendants.

STATE OF OREGON, } ss:
County of Multnomah, }

We hereby admit due and legal service to have been made upon us, in the above county and State, on this ninth day of August, A. D. 1890, of the within notice of motion, and hereby further admit having received a duly certified copy of said notice.

DOLPH, BELLINGER, MALLORY AND SIMON,
Solicitors for Complainant.

Endorsed: Filed August 9, 1890. R. H. Lamson, clerk.

64 And afterwards, to wit, on Monday, the 11th day of August, 1890, the same being the 60th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

65 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY
vs.
SYLVESTER PENNOYER *et al.* } No. 1708.

AUGUST 11, 1890.

Now, at this day, comes the plaintiff, by Mr. C. B. Bellinger, of counsel, and the defendants, by Mr. E. C. Bronaugh, of counsel, and on motion of said defendants it is ordered that this cause be, and the same is hereby, set for rehearing on the demurrer to the amended bill on Wednesday, August 13, 1890.

66 And afterwards, to wit, on Monday, the 18th day of August, 1890, the same being the 63rd judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

67 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY
vs.
SYLVESTER PENNOYER, G. W. McBRIDE, and G. W. WEBB. } No. 1708.

AUGUST 18, 1890.

This cause was reheard upon the demurrer to the amended bill herein, and was argued by Mr. Charles B. Bellinger, of counsel for the plaintiff, and by Mr. Earl C. Bronaugh and Mr. Lewis L. McArthur, of counsel for the defendants; on consideration whereof it is ordered and adjudged that the order heretofore made on July twenty-eighth, eighteen hundred and ninety, overruling said de-

murrer to said amended bill be, and the same is hereby, confirmed; and thereupon, said defendants declining to further plead, but electing to stand upon said demurrer to said amended bill, said plaintiff moves the court for a decree herein, as prayed in said amended bill. It is therefore adjudged and decreed that said defendants and each of them be, and they are hereby, perpetually enjoined and restrained from offering for sale or from selling or from executing or issuing, for and in behalf of the State of Oregon or as the act of the board of land commissioners of the State of Oregon for the sale of school and university lands or otherwise, any deed to any of the lands mentioned in said amended bill and described as follows, to wit: All of section one, all of section two, the east half and the east half of the west half, except lots one, two, three, and four, of section three; the east half of the southeast quarter of section nine, all except lot one of
68 section ten, all of section eleven, all of section twelve, all of section thirteen, all of section fourteen; the north half and the southeast quarter, except lots one, two, and three, of section fifteen; the east half, except lots one, two, three, and four, of section twenty-two; all of section twenty-three, all of section twenty-four, all of section twenty-five, all of section twenty-six; the east half of the east half, except lots one, two, three, and four, of section twenty-seven; the southeast quarter and the southeast quarter of the southwest quarter, except lots one, two, three, and four, of section twenty-nine; the southeast quarter and the southeast quarter of the northeast quarter, except lots one, two, and three, of section thirty-one; all except lot one of section thirty-two; all except lots one, two, three, and four of section thirty-three; all except lots one, two, and three of section thirty-four; all of section thirty-five, all of the above-described lands being in township thirty-nine south of range twenty-four east of the Wallamet meridian; also the west half, except lots one, two, three, and four, of section four; all of section five, all of section six, all of section seven, all of section eight; the west half, except lots one, two, three, and four, of section nine; all of section seventeen, all of section eighteen, all of section nineteen, all except lot one of section twenty, in township thirty-eight south of range twenty-five east of the Wallamet meridian; also the west half of the southeast quarter, the south half of the northwest quarter, and the southwest quarter of section five, and all except lots one, two, three, four, five, six, seven, and eight of section six, in township forty south of range twenty-five east of the Wallamet meridian; also the north half, except lots one, two, three, four, five, and six, of section one; the southwest quarter of the southwest quarter of section one; all except lots one, two,
69 three, four, five, six, seven, eight, and nine of section two; all of section three, all of section four, all of section five; the east half, the east half of the southwest quarter, and the southwest quarter of the northwest quarter, except lots one, four, five, and six, of section six; the east half and the southwest quarter of section seven; the east half of the northwest quarter and the southwest quarter of the northwest quarter, except lots one, two, and three, of section seven; all of section eight, all of section nine, all of section

ten; the west half of the west half, except lots one, two, three, and four, of section eleven; all except lots one, two, three, four, five, six, and seven of section fifteen; all of section seventeen, all of section eighteen; the east half, except lots one, two, and three, of section nineteen; all of section twenty; the east half of the east half, the southwest quarter of the northeast quarter, and the west half of the southeast quarter of section twenty-five; the north half of the northwest quarter, the southwest quarter of the northwest quarter, except lots one and two, of section twenty-eight; the northeast quarter and the north half of the northwest quarter, except lots one, two, three, and four, of section twenty-nine, all in township forty south of range twenty-four east of the Wallamet meridian; the west half and the west half of the east half of section nineteen; the west half and the west half of the east half of section thirty; the west half and the west half of the east half of section thirty-one, all in township thirty-nine south of range twenty-five east of the Wallamet meridian; the northwest quarter and the northwest quarter of the southwest quarter, except lots one, two, three, and four, of section twenty-one; the southeast quarter of the southeast quarter of
70 section twenty-nine; the west half and the west half of the east half, except lots one, two, three, four, five, and six, of section thirty; all except lot one of section thirty; all except lots one, two, three, four, five, and six of section thirty-one; the south half of section one; all of section twelve, all of section thirteen; the south half of section twenty-three; the east half of the southeast quarter of section twenty-two; all of section twenty-four, all of section twenty-five, all of section twenty-six; the east half of section twenty-seven; the east half of section thirty-four; all of section thirty-five, all in township thirty-eight south of range twenty-five east of the Wallamet meridian; also the west half, except lots one and two, of section twenty-eight; all except lots one, two, and three of section twenty-nine; all except the northeast quarter of the northwest quarter and the northwest quarter of the northeast quarter and lots one, two, three, and four and the southwest quarter of the southwest quarter of section thirty; the east half and the east half of the west half of section thirty-one; all of section thirty-two; the west half and the southeast quarter, except lots one, two, three, and four, of section thirty-three; the west half of the west half, except lots one, two, three, and four, of section nineteen, all in township thirty-seven south of range twenty-five east of the Wallamet meridian; also the west half and the west half of the east half of section five; the east half of section six; the east half of the east half and the northwest quarter of the northeast quarter of section seven; the west half and the west half of the east half of section eight; the west half of the east half, the northwest quarter, and the northeast quarter of the southwest quarter of section seventeen, all in township forty-one south of range twenty-five east of the Wallamet meridian; also the west half, the
71 north half of the northeast quarter, and the southwest quarter of the northeast quarter of section four; the east half, the northwest quarter, and the northeast quarter of the southwest quarter

of section five; the south half of the southeast quarter of section seven; the northeast quarter of section eighteen, all in township forty south of range twenty-three east of the Wallamet meridian; also the south half of the northwest quarter and the southwest quarter section four; the south half of the northeast quarter, the southeast quarter, the southeast quarter of the northwest quarter, and the east half of the southwest quarter of section five; the east half, the southwest quarter, and the east half of the northwest quarter of section eight; the west half of the southwest quarter and the southwest quarter of the northwest quarter of section fifteen; the east half, the east half of the west half, and the northwest quarter of the northwest quarter of section seventeen; the northeast quarter of section twenty; the west half and the southwest quarter of the southeast quarter of section nine; the north half, the southwest quarter, and the north half of the southeast quarter of section twenty-one; the west half of the northwest quarter and the northwest quarter of the southwest quarter of section twenty-two, all in township forty south of range twenty-two east of the Wallamet meridian; also the west half of the west half, except lots one, two, three, and four, of section six; the southwest quarter, the west half of the southeast quarter, the west half of the northwest quarter, the southeast quarter of the northeast quarter, except lots one, two, three, and four, of section seven; all except lots one and two of section eighteen, all in township thirty-
nine south of range twenty-five east of the Wallamet meridi-
72 ian, said lands containing in all the sum of forty-three thousand two hundred and seven and sixty one-hundredths acres. And it is further adjudged and decreed that said plaintiff do have and recover of and from the defendants his costs and disbursements herein, taxed at — dollars.

(Signed) DEADY, *J.*

Endorsed: Filed August 18, 1890. R. H. Lamson, clerk.

73 And afterwards, to wit, on the 18th day of August, 1890, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

74 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy
v.
Sylvester Pennoyer, George W. McBride, C. W. Webb. } No. 1708.

Suit for an Injunction. Rehearing.

Monday, *August* 18, 1890.

(1.) Cloud on title.—A resale and conveyance of a tract of swamp land under the act of 1887, before sold by the State under the act of 1870, on the ground that it had reverted to the State

for the failure to pay the 20 per centum of the purchase price within the time required by law, would cast a cloud on the title of the purchaser or his assignee under the act of 1870.

Multiplicity of suits.—The prevention of a multiplicity of suits is an acknowledged head of equity jurisdiction, and this suit is clearly maintainable on that ground.

Suit against a State.—This is not a suit against the State of Oregon or its authorized agents or representatives, but against the defendants, claiming to act as such, but without authority of law. The cases of *In re* Ayers (123 U. S., 443) and Haus *v.* Louisiana (134 U. S., 1) considered and distinguished from this.

DEADY, *J.*:

On the application of the defendants a rehearing was allowed in this case.

On the argument the case of Hans *v.* Louisiana (134 U. S., 1) was cited by counsel for defendants as a case not referred to, because not at hand on the former hearing.

On examination the decision was found not to be at all in point, and it was so admitted by counsel.

Briefly the case was this: A citizen of Louisiana sued the State to recover the amount of certain coupons annexed to the bonds thereof. These bonds were issued in 1874, and by an amendment to the constitution of that year they were declared valid contracts between the State and the holders thereof, and by the constitution of 1879 payments of the same were repudiated. The eleventh amendment does not prohibit a suit in the national courts against a State by a citizen thereof, and the judicial powers of the United States extend to all cases arising under the Constitution or laws of the United States (Con., art. 1, § 3), which jurisdiction is conferred upon the circuit courts by section 1 of the act of 1875, 18 Stat., 470.

So the plaintiff brought his action against the State as one arising under the Constitution of the United States, which forbids a State to "pass a law impairing the obligation of contracts."

The case was a new one, the question involved never having been before the court. It was held that a suit arising under the Constitution of the United States cannot be maintained against a State by a citizen thereof without its consent.

This conclusion rests, in the opinion of the court, on the general doctrine that a State is not suable except with its own consent, and therefore the grant of judicial power to the United States, though in language extending to all cases arising under the Constitution thereof, must be construed as not including a case against a nonconsenting State.

But Mr. Justice Bradley, who delivered the opinion of the court, in conclusion took care to say (p. 20): "To avoid misapprehension it may be proper to add that although the obligations of a State rest for their performance upon its honor and good faith and cannot be made the subject of judicial cognizance unless the State consents to be sued or comes itself into court, yet where property or rights are

enjoyed under a grant or contract made by a State they cannot be wantonly invaded. Whilst the State cannot be compelled by suit to perform its contracts, any attempt on its part to violate property or rights acquired under its contracts may be judicially resisted, and any law impairing the obligation of contracts under which such property or rights are held is void and powerless to effect their enjoyment." Now, the case under consideration is clearly within this category. While the purchaser of this property may not be able to sue the State, to compel a specific performance of its contract, to convey the same to him when he is entitled thereto, on "reclamation" and payment of the balance of the purchase price, because a "State," in the language of the court, "cannot be compelled to perform its contracts," yet the purchaser has already acquired an interest in this land under his contract with the State and a right to the possession and enjoyment of the same in the meantime, and any attempt by the State or its agents to deprive him of such interest or right or to impair the value of the same, contrary to such contract, may be judicially resisted; and that is what the plaintiff seeks to do by this suit.

On the argument counsel for the defendants endeavored to show that this case came within the ruling *In re* Ayers, 123 U. S., 443.

But the cases are really just the antipodes of each other. The court in that case, after stating the general rule as laid down in Hagood *vs.* Southern (117 U. S., 52), that a suit against the officers of a State to compel them to do and perform certain acts, which, when done and performed, constitute a performance of an alleged contract by such State, is a suit against the State, say (p. 502): "The converse of this proposition must be equally true, because it is contained in it—that is, a bill, the object of which is by injunction indirectly to compel the specific performance of the contract by forbidding all those acts and doings which constitute breaches of the contract, must also necessarily be a suit against the State."

Now, the plaintiff in this case is not seeking by this suit to compel the performance, directly or indirectly, of any contract with the State.

On the sale of this land under the act of 1870 the purchaser or his assignee became entitled, on payment of the purchase price and proof of reclamation within the time prescribed, to a conveyance from the State.

If this were a suit to compel the specific performance of so much of that contract as remains unperformed by the State—that is, the execution by these defendants of a conveyance of the land to the plaintiff—it would be a suit against the State, although not named in the record.

A decree for the plaintiff in such a case would require the defendants to do and perform an act which they could only do as the agents and representatives of the State, and therefore the court would be without jurisdiction.

By this suit the plaintiff is not seeking to compel the defendants to do or perform any act, but rather to prevent their doing an act

injurious to his right and interest in this property without authority of law or the State and contrary to its express contract.

If the Legislature had authorized the defendants to cause suit to be brought against the purchasers under the act of 1870 to declare the contracts of sale void for want of compliance with the conditions subsequent, and the plaintiff should bring a suit to enjoin the defendants from bringing any suit against him, alleging that he was not in default as to any of said conditions, the case would be parallel with *In re* Ayers and the answer would be the same in each case: This is a suit against the defendants as agents and representatives of the State to prevent the State from doing a lawful act, namely, to bring a suit to set aside a sale of its lands which it claims has become forfeit for want of compliance with the terms of the sale, and in which the plaintiff may allege and show a compliance with the contract and thereby defeat the suit.

On the rehearing no question was made but that the legislation under which the defendants are acting in making sales of the plaintiff's land is unconstitutional and void and therefore furnishes no justification for their conduct.

On the hearing it was not seriously questioned that equity would grant the relief sought by the plaintiff in this case, if the suit was not one against the State, on the ground of preventing a cloud being cast on his title and also of preventing a multiplicity of suits.

On this point counsel at the rehearing contented himself with saying that if the defendants were not authorized to sell this land their deeds thereto would be void on their face, and therefore would not cast a cloud on anything.

But the case assumed by counsel is not this case by any means, for the invalidity of the defendants' deeds would not necessarily appear on their face, if at all.

The defendants have the general and exclusive authority to dispose of the swamp lands of the State, including those which may have reverted thereto, for delinquency under section 9 of the act of 1878. The plaintiff, to overcome the apparent legal title which the sale and conveyance of his land would vest in the defendants' grantee, would be obliged to resort to extrinsic evidence to show that this land had been duly bargained and sold to his grantor and had not reverted to the State under section 9 of the act of 1878, and therefore the second sale was unauthorized and wrongful.

This constitutes a cloud on title within all the authorities, and particularly where, as in this case, the plaintiff's interest is equitable in its nature. Pom. Eq., §§ 1398–'99; Coulson *v.* Portland, 1 Deady, 489. And an injunction will issue to prevent acts which would create a cloud upon title under the same rules that control in a suit to remove such cloud. Pom. Eq., § 1345.

The prevention of a multiplicity of suits is a recognized head of equity jurisdiction. Pom. Eq., § 243 *et seq.*

The defendants are not now authorized to dispose of swamp land in larger quantities than 320 acres to any one person, and that may be sold outright and a conveyance made to the purchaser at once. The disposition of this large tract of land in this manner may involve

at least 150 sales to as many different persons. If such sales are allowed to be made, the plaintiff will be compelled, in the assertion and maintenance of his right, to bring a separate suit in equity against each of such purchasers to quiet title or to charge him as a trustee of the legal title for the benefit of the plaintiff, the owner of the equitable estate.

This presents a very strong case of a multiplicity of suits which may be prevented by this suit, in which the whole matter may be considered and determined at once and thus save the expense and delay to all persons concerned.

This suit is very properly brought in this court, independent of the diverse citizenship of the parties, as it turns altogether on Federal questions which must ultimately be settled by the judgment of the Supreme Court of the United States.

These questions are: (1) Does the legislation under which the defendants are proceeding to sell the plaintiff's land impair the obligation of his contract with the State; and (2) Is this a
75 suit against the defendants as individual wrong-doers, claiming to represent the State, but without authority therefrom, or against them as the authorized representatives of the State.

And my judgment still is that said legislation does impair the obligation of the State's contract, and that this is not a suit against the defendants acting as the authorized agents and representatives of the State, but as individual wrong-doers, acting under an unconstitutional act of the Legislature, which is not and cannot be a law of the State, and therefore is no justification for the conduct complained of.

Mr. Charles B. Bellinger, for the plaintiff; Mr. Earl C. Bronaugh, for the defendants.

(Signed) MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed August 18, 1890. R. H. Lamson, clerk.

76 And afterwards, to wit, on Monday, the 1st day of September, 1890, the same being the 69th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

77 In the Circuit Court of the United States for the District of Oregon.

R. F. McConnaughy
vs.
Sylvester Pennoyer, G. W. McBride, and G. W. Webb. } No. 1708.

September 1, 1890.

Now, at this day, on motion of Mr. Lewis L. McArthur, of counsel

for the defendants, it is ordered that said defendants be, and they are hereby, allowed to appeal this cause to the Supreme Court of the United States upon giving a bond for costs in the sum of one thousand dollars, the plaintiff appearing by Mr. C. B. Bellinger, of counsel.

78 And afterwards, to wit, on the 3d day of September, 1890, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

79 In the Circuit Court of the United States for the District of Oregon.

R. F. McCONNAUGHY, Complainant,
vs.
SYLVESTER PENNOYER, G. W. McBRIDE, and G. W. WEBB, Defendants. } No. 1708.

Know all men by these presents that we, Sylvester Pennoyer, G. W. McBride, and G. W. Webb, as principals, and W. T. Slater and Napoleon Davis, as sureties, are held and firmly bound unto the above-named R. F. McConnaughy in the sum of one thousand dollars, to be paid to the said R. F. McConnaughy, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 2nd day of September, A. D. 1890.

Whereas the above-named Sylvester Pennoyer, G. W. McBride, and G. W. Webb have appealed to the Supreme Court of the United States to reverse the final decree in the above-entitled cause by the circuit court of the United States for the district of Oregon on the 18th day of August, A. D. 1890:

Now, therefore, the condition of this obligation is such that if the above-named Sylvester Pennoyer, G. W. McBride, and G. W. Webb shall prosecute said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

SYLVESTER PENNOYER. [L. S.]
G. W. McBRIDE. [L. S.]
G. W. WEBB. [L. S.]
W. T. SLATER. [L. S.]
NAPOLEON DAVIS. [L. S.]

Signed, sealed, and delivered in presence of—

WM. A. MUNLY.
W. J. DE ARCY.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, W. T. Slater, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

W. T. SLATER.

Subscribed and sworn to before me this 2d day of September, 1890.

JAS. WALTON,
Commissioner of the Circuit Court of the United States for the District of Oregon.

[Endorsed:] No. 1708. U. S. circuit court, district of Oregon. R. F. McConnaughy *vs.* Sylvester Pennoyer, G. W. McBride, and G. W. Webb. Bond.
(Endorsed:) Filed Sept. 3, 1890. R. H. Lamson. Approved. (Signed) Deady, J.

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Napoleon Davis, being duly sworn, depose and say that I am one of the sureties in the foregoing bond; that I am a resident and freeholder within said district, and that I am worth in property situated therein the sum of two thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

NAPOLEON DAVIS.

Subscribed and sworn to before me this 2d day of September, 1890.

JAMES WALTON,
Commissioner of the Circuit Court of the United States for the District of Oregon.

80 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing pages, numbered from one to seventy-nine, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of R. F. McConnaughy *versus* Sylvester Pennoyer, G. W. McBride, and G. W. Webb as the same remain of record and on file in my office and in my custody.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court, at Portland, in said district of

Oregon, this 4th day of September, in the year of our Lord one thousand eight hundred and ninety.

[Seal United States Circuit Court, Oregon.]

R. H. LAMSON,
Clerk of said Court,
By R. B. LAMSON,
Deputy Clerk.

Endorsed on cover: Oregon C. C. U. S. No. 1280. Sylvester Pennoyer, G. W. McBride, and G. W. Webb, appellants, *vs.* R. F. McConnaughy. Filed September 12, 1890.

Office Supreme Court, U. S.
FILED.
DEC 30 1890
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1890.

No. 1280

SYLVESTER PENNOYER, G. W. McBRIDE AND G. W. WEBB, APPELLANTS,

vs.

R. F. McCONNAUGHY, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

ARGUMENT IN BEHALF OF APPELLANTS.

United States Supreme Court.

OCTOBER TERM, 1890.

SYLVESTER PENNOYER, G. W. McBRIDE, and G. W. WEBB, Appellants. *vs.* R. F. McCONNAUGHY, Appellee.	No. 1280.

Appeal from the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT ON PART OF APPELLANTS.

STATEMENT OF THE CASE.

On April 19, 1890, R. F. McConnaughy filed his Bill of Complaint in the Circuit Court of the United States for the District of Oregon, against Sylvester Pennoyer, G. W. McBride and G. W. Webb, praying for a perpetual injunction restraining them from disposing of certain swamp and overflowed lands lying within the limits of the

State of Oregon. To this Bill a demurrer was filed. After the filing thereof the appellee asked and was granted leave to amend his Bill. Immediately upon the filing of the amended Bill, it was agreed in open court by counsel representing the different parties, that the demurrer filed to the Bill should stand as and for a demurrer to the amended Bill and it was so ordered by the Court.

From the amended Bill we gather that McConnaughy is a citizen of the State of California and that appellants are citizens of the State of Oregon. That Sylvester Pennoyer was and is Governor of the State of Oregon; that G. W. McBride was and is the Secretary of State of the State of Oregon; that G. W. Webb was and is Treasurer of the State of Oregon, and that said three officers comprise the Board of Land Commissioners for the sale of School and University lands under the laws of said State.

That on March 12, 1860, Congress passed and the President approved an Act, granting to the State of Oregon all the swamp and overflowed lands within its limits. That after the passage of said Act, the lands described in the Exhibit attached to the amended Bill were duly certified to the State of Oregon by the Secretary of the Interior as swamp and overflowed lands.

That on October 26, 1870, the Legislative Assembly of Oregon passed an Act, which was duly approved, providing for the sale of the swamp

and overflowed lands enuring to the State under the Congressional grant referred to, that said Act provided for the making and filing of maps and descriptions of the swamp and overflowed lands within the several Counties of the State, for the forwarding by the County Clerks, to the Land Commissioner of the State, under their official certificates, the date on which the same were so filed, and that upon the receipt of such certificates, it was made the duty of said Commissioner to give public notice of said completion, approval and filing of said maps, etc., for four weeks successively, in some weekly newspaper published in such county. That said Act further provided that such swamp and overflowed lands should be sold by the Commissioner, representing the State, at a price not less than one dollar per acre in gold coin, to such persons as should file their applications therefor as provided therein, and it was further provided thereby that within ninety days after the date of the said publication of said public notices, twenty per centum of the purchase money, should be paid by the applicant to the Commissioner, whose duty it then became to issue to the applicant a receipt therefor. That as to the residue of the purchase money it was provided that it should be paid upon proof of reclamation. And said Act further provided for the proof of reclamation by the purchaser of said land, within ten years from and after his first payment, and for payment within such time of the residue of the purchase

price, and it also provided that, in case the office of Commissioner of Lands was not created by law, the provisions of the act should be executed by the Board of Commissioners for the sale of School and University lands for the State of Oregon.

That prior to October 18, 1878, one H. C. Owen had regularly made application, in pursuance of the Act of October, 18, 1870, for the purchase of certain swamp and overflowed lands, including those in controversy; that thereafter, on November 23, 1881, and April 3, 1884, and prior to the expiration of the ninety days from the date of public notice provided for in said Act of 1870, the said Owen duly paid to the Board of Land Commissioners the twenty per centum required by the Act of 1870, upon all the lands described in the Exhibit to the amended Bill, and upon such payment being made the Board of Land Commissioners duly executed a certificate of sale to Owen, and that the lands so paid for and certificated, aggregate 43,207, 60-100 acres and are situated in Lake County, Oregon.

That about October, 15, 1884, the appellee purchased the said 43,207 60-100 acres of land from one C N. Felton, the grantee of Owen, paying therefor to Felton the sum of $30,000.00, assumed the payment of the residue of the purchase price of the said lands to the State of Oregon, and

is now occupying and using the same for the purpose of making hay and for pasturage.

That on October 18, 1878, the Legislative Assembly passed and the Governor approved an Act, by which it was provided that all applications for the purchase of swamp and overflowed lands made previous to the passage of said Act, which have not been regularly made in accordance with law, or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, were declared void and of no force or effect whatsoever; and also that on February 16, 1887, the Legislative Assembly passed and the Governor approved an Act, by which it was provided that all certificates of sale issued by the Board of Commissioners for swamp and overflowed lands on which the twenty per centum of the purchase price had not been paid prior to January 17, 1879, were declared void and of no force or effect whatever, and that this Act provided that the Board of Commissioners should be authorized and directed to cancel said certificates of sale.

That appellants assuming to act as the Board of Land Commissioners have canceled the certificates of sale issued to Owen, and through which the complainant derives title to the lands in controversy, pretending that such certificates were void

under the Act of 1887, for the reason that the twenty per centum of the purchase price of said lands was not paid prior to January 17, 1879, the date on which the said Act of October 18, 1878, went into effect, although in fact such payment was made by Owen prior to the expiration of the ninety days from the date of the public notice provided for in the Act of 1870, for the completion, approval and filing of the maps and descriptions covering said lands.

That on February 25, 1890, the appellants, assuming to act as a Board of Land Commissioners for the State of Oregon, made the following order:

"In the matter of the application of W. Z. Moss, *et al.*, to purchase certain swamp lands in the Warner Lake Valley, recently certified to the State by the Secretary of the Interior, in List No. 12, Lakeview District, it was ordered that the said application made in pursuance of the Act approved February 16, 1887, relating to swamp lands, be executed, and that deeds be issued to the lawful applicants for the lands described therein, as far as the same shall appear in said certified list; Provided that no deed shall issue to any person but an actual settler, till after the expiration of ninety days from the time said list was filed with the Clerk of the Board."

That the said W. Z. Moss, *et al.*, mentioned in said order were applicants under the Act of 1887, to purchase from the State certain of the lands in controversy, belonging, as alleged, to the appellee, and acquired by him from Felton, and that in the

month of April, 1890, so assuming to act, the appellants did pretend to sell about one thousand acres of said lands of complainant and to issue in the name of the State of Oregon, deeds therefor to the person purchasing the same.

That a large number of applicants for the purchase of the lands so belonging to the complainant are on file in the office of said Commissioners, and a large number of other persons are proposing, upon the expiration of the ninety days mentioned in the said order, above set forth, to make application for the purchase of the lands belonging to the complainant.

That the appellants are without any authority to so sell and dispose of the lands of the appellee; that said Act of the Legislative Assembly of the State of Oregon, of 1887, declaring the certifiates of purchase of swamp lands upon which twenty per centum had not been paid prior to the going into effect of the said Act of 1878, is void, and of no force or effect, as impairing the obligations of the contract which the appellee has with the State of Oregon for the purchase of the lands in controversy, and that prior to the making of the said order above set forth, the appellee protested to the appellants so assuming to act as aforesaid, against the sale of his said lands, but that such protests were wholly disregarded by them, and, further, that unless restrained therefrom, the appellants assuming to act as the Board of Land

Commissioners will, at the expiration of ninety days mentioned in the order above set forth, proceed to sell the above lands and to execute, as and for the State of Oregon, deeds therefor, which acts, pretenses and doings will operate to cloud appellee's title to said lands and involve him in a multiplicity of suits, to his wrong and irreparable injury in the premises.

The prayer is for a perpetual injunction, etc.

The demurrer to the amended Bill is based upon substantially the following grounds:

I. That it doth not show any facts which entitle McConnaughy to maintain the suit.

II. That it doth not appear that Pennoyer, McBride and Webb, or either of them, have or had any direct or personal interest in the lands in controversy, or any part thereof, but on the contrary they are sued in their official capacity as Governor, Secretary of State and State Treasurer of the State of Oregon and that the lands in suit are part of the public domain of the State of Oregon, which State is not and cannot be made a party to the suit.

III. That the court is without jurisdiction, and cannot exercise jurisdiction in the suit without disregarding Article XI. of the Constitution of the United States.

IV. That the suit is not founded on fraud, accident, mistake, trust, specific performance or any ground of equity jurisdiction, that the amended

Bill doth not set out any equity against the defendants or either of them, but on the contrary is filed and brought to the attention of the Court for the purpose of having the Court declare certain laws of the State of Oregon, which the defendants have sworn to obey, unconstitutional and void.

After argument the demurrer to the amended Bill was overruled on July 28, 1890. On August 9, 1890, a petition for re-hearing was filed, pursuant to which re-argument was had on August 13, 1890. Thereafter, and on August 18, 1890, the order made on July 28, 1890, overruling the demurrer to the amended Bill was confirmed and a final decree as prayed for in the said amended Bill was made and entered. It is from this that the appeal is taken.

THE PROVISION OF THE STATE CONSTITUTION AND THE ACTS OF THE LEGISLATIVE ASSEMBLY OF OREGON BEARING UPON THE QUESTIONS ARISING IN THIS CASE.

Article VIII. Section 5, of the Constitution of the State of Oregon provides as follows:

§ 5. The Governor, Secretary of State and State Treasurer, shall constitute a board of Commissioners for the sale of School and University lands, and for the investment of the funds arising therefrom, and their powers and duties are such as may be described by law; *Provided*, That no part of the University funds, or of the interest arising therefrom, shall be expended until the period of ten years from the adoption of this Constitution,

unless the same shall be otherwise disposed of by the consent of Congress for common school purposes.—Compilation of the Laws of Oregon, by W. L. Hill, 1887, Vol. 1, p. 105.

On October 26, 1870, the Legislative Assembly of Oregon passed, and the Governor approved, an Act to provide for the selection and sale of the swamp and overflowed lands belonging to the State of Oregon, which Act is as follows:

Whereas, Congress, by an Act entitled "An Act to extend the provisions of an Act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits to Minnesota and Oregon, and for other purposes," approved September 12, 1860, has granted to this State all the swamp and overflowed lands within its limits; and

Whereas, By the failure of the Secretary of the Interior to notify the Governor of the State that the surveys have been completed and confirmed in accordance with the provisions of said Act, no swamp or overflowed lands have been selected in this State; therefore,

Be it enacted by the Legislative Assembly of the State of Oregon as follows:

Section 1. It shall be the duty of the Commissioner of Lands to appoint a suitable person or persons as his deputies to proceed as soon as practicable to select in the field all the land rendered unfit for cultivation by inundation or overflow within this State, and to make return of same to said Commissioner. And it shall be the duty of such deputies to describe each tract of swamp or overflowed land they may select in a clear and distinct manner, either by legal subdivisions or

by actual survey, and upon the receipt of such returns it shall be the duty of said Commissioner to carefully examine the same.

Sec. 2. So soon as the selection of swamp and overflowed lands in any County has been completed by said Commissioner of Lands, it shall be the duty of said Commissioner to make out maps and descriptions thereof in duplicate, one copy to be kept in suitable books in his office, and the other to be filed in the office of the County Clerk of the County in which such swamp lands may be located; and it shall be the duty of such County Clerk to forward his official certificate to said Commissioner of the date on which said maps and descriptions were so filed. Upon the receipt of such certificate it shall be the duty of said Commissioner to give public notice of said completion, approval and filing, for four weeks successively in some weekly newspaper published in such County; and if no newspaper is published in such County, then in such newspaper as he may select in an adjoining County.

Sec. 3. The swamp and overflowed lands of this State shall be sold by said Commissioner at a price not less than one dollar per acre in gold coin. Any person over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen, as required by the naturalization laws, may become an applicant for the purchase of any tract or tracts of said swamp and overflowed lands upon filing his application therefor (describing the tract or tracts he desires to purchase), by the actual survey; or, if no survey has been made, then by fences, ditches, monuments, or other artificial or natural landmarks, with said Commissioner, whose duty it shall be to immediately endorse thereon the actual date of such filing. In case of

adverse applicants for the same tract or parcel of swamp land, it shall be the duty of said Commissioner to sell the same to the legal applicant therefor whose application is first filed. Within ninety days after the date of the public notice provided in Section two of this Act, twenty per centum of the purchase money shall be paid by the applicant to said Commissioner, whose duty it shall be to issue to the applicant a receipt therefor, and the balance of the purchase money shall be paid on proof of reclamation, as hereinafter provided.

Sec. 4. No patent shall be issued to any applicant for any swamp or overflowed lands until the applicant therefor has proved, to the satisfaction of said Commissioner, that the land for which he claims a patent has been drained or otherwise made fit for cultivation; but upon such proof being made, and payment of the balance of the purchase money on the amount of land actually reclaimed, the said Commissioner shall issue to the applicant making such proof and payment, a patent for the land so reclaimed. Said patent shall be approved and signed by the Governor, Secretary of State and State Treasurer, as provided for by the Constitution. At the expiration of ten years from and after his first payment, all swamp lands claimed by an applicant, upon which no such proof of reclamation and payment has been made, shall revert to the State, and the money paid thereon shall be forfeited; *Provided*, That all swamp land which has been successfully cultivated in either grass, the cereals or vegetables for three years, shall be considered as fully reclaimed within the meaning of this Act.

Sec. 5. The deputies employed to select the swamp and overflowed lands, as provided in Section one of this Act, shall receive five dollars per

day for each day actually employed in the discharge of their duties, and such further allowance for traveling, assistance and other necessary expenses, as may be ascertained by said Commissioner, which shall be paid as other expenses arising from the management of the State lands.

Sec. 6 As the State is likely to suffer loss by further delay in taking possession of the swamp lands within its limits, this Act shall take effect and be in force from and after its approval by the Governor; *Provided*, That in case the office of Commissioner of Lands is not created by law, the provisions of this Act shall be executed by the Board of Commissioners for the sale of School and University lands.

Approved October 26, 1870. *Vide* Session Laws of 1870, pp. 54, 55, 56 and 57.

In the compilation of the General Laws of Oregon from 1843 to and including 1872, compiled and annotated by Matthew P. Deady and Lafayette Lane, Sections 1, 2 and 5 of the forego- Act appear as Sections 6, 7 and 8 of Title I. of Chapter 29. (*Vide* p. 630 of said Compilation.) Sections 3 and 4 of the said Act appear as Sections 61 and 62 of Title IV. of said Chapter 29. (*Vide* p 642 of said Compilation.)

An Act providing for the selection, location and sale of State Lands, and the management and dsiposition of the proceeds arising therefrom; and to repeal all of Chapter 29 of the Miscellaneous Laws of Oregon, except Title 3 of said Chapter, as compiled by Matthew P. Deady and Lafayette Lane; an Act to amend an Act entitled "an Act to provide for the sale of school lands,

and the management of the common school fund," approved October 26, 1874; an Act to amend an Act entitled "an Act to provide for the sale of tide and overflowed lands on the sea-shore and coast," approved October 26, 1874; an Act requiring local agents of the board of school land commissioners to give bonds for the security of public school funds in their hands, and requiring reports thereon, approved October 20, 1876, and an Act to amend an Act to provide for the sale of tide and overflowed lands on the sea-shore and coast. approved October 21, 1876.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That the Governor of this State is hereby appointed Land Commissioner for the State of Oregon, and empowered to locate all the lands to which this State is entitled, under the laws of the United States or otherwise, and he shall be allowed all necessary expenses incurred by him in performing the duties prescribed in this Act.

Sec. 2. It shall be the duty of the Governor as such Land Commissioner, to prepare accurate lists of the lands by him selected in duplicate, in the manner prescribed by the laws of the United States, and the instructions of the Commissioner of the General Land Office, and designate in such lists the purpose to which the lands selected shall be applied, one copy of which he shall forward to the Register of the Land Office in the District where the lands selected are situated, the other shall be deposited with the Secretary of State, who shall record the same in a book to be kept for that purpose.

Sec. 3. The Governor, Secretary of State and State Treasurer, as a board of commissioners for

the sale of school and university lands, and for the investment of the funds arising therefrom, are hereby authorized and required to sell school and university lands, capitol building lands, land granted to the State by the United States adjoining salt springs, lands granted the State for the purpose of internal improvement, and agricultural college lands which have been, or may hereafter be, selected, to actual settlers, in such quantities as they may deem advantageous to the State, not exceeding a half section to any one settler, and not exceeding one hundred and sixty acres to any one person not a settler; as fast as such selection shall be approved by the Commissioners of the General Land Office, at a price not less than two dollars and fifty cents per acre for agricultural college lands, and not less than two dollars per acre for all other lands specified in this section.

Sec. 4. Such board of commissioners are further authorized and required to sell swamp and overflowed lands, which may have been or may hereafter be selected, as fast as such selections are segregated and approved, as required by the laws of the United States granting such lands to the State; and the tide and overflowed lands on the seacoast, owned by the State, in such quantities as they shall deem most advantageous to the State, not exceeding three hundred and twenty acres to any one person, at a price not less than one dollar per acre for swamp lands, and not less than two dollars per acre for tide lands; *Provided*, That the owner or owners of any lands abutting or fronting upon or bounded by the shore of the Pacific Ocean, or of any bay, harbor, inlet, lake or watercourse, shall have the right, for one year following the passage of this act, to purchase all the tide or swamp lands belonging to the State in

front of the lands so owned, to the amount of one half section to each owner; *Provided further*, That if valuable improvements have been made upon any of the tide lands of this State before the title to the land on the shore passed from the United States, the owner of such improvements shall have the exclusive right to purchase the land so improved, extending to low water mark, for the period aforesaid.

Sec. 5. All applications to purchase any of the lands of this State shall be addressed to the said Board of Commissioners and, except for tide lands, shall contain a precise description of the land applied for, by legal subdivisions, according to the United States survey, such lands to be in compact form, which application shall be accompanied by the affidavit of the applicant, taken before some Notary Public or County Clerk, to the effect that he is 18 years of age, is a citizen of the United States, or has declared his intention to become such; that he is a citizen of this State; that he has not directly or indirectly made any previous purchase of land from the State, or any for him, which, together with the lands described in the application exceed—in case such application is for the purchase of any of the lands specified in the third section of this act by a settler—three hundred and twenty acres, or in case of a non-settler, one hundred and sixty acres, or if the application is for the purchase of any lands specified in the fourth section of this act, three hundred and twenty acres; that each proposed purchase is for the actual use of the applicant, and not for purposes of speculation; that no contract agreement, express or implied, has been made for the sale or other disposition of such lands, in case such applicant is permitted to purchase the same. In case such application is made for the purchase of

more than one hundred and sixty acres of the lands specified in section 3 of this act, such affidavit shall set forth in addition to the foregoing, that the applicant is an actual settler in such tract, that he intends to make it his home, and that he knows of no prior settler claiming any portion of said land. All persons who have made or shall hereafter make actual settlement on any of the lands specified in this act, shall have the exclusive right to purchase such lands, except timbered lands, for ninety days following such settlement.

Sec. 6. The board shall make such rules and regulations for ascertaining the value of lands as they may deem conducive to that end, and upon satisfactory proof of the value of any lands for which application has been made, they may sell the same to such applicant at such valuation, under the restrictions hereinbefore contained in this act. The applicant, upon paying to the commissioners one-half of the purchase price, in the case of timbered lands, and executing his promissory note to such board for the other half, due in one year, bearing interest at the rate of ten per cent. per annum, and in all other cases, except tide and swamp lands, upon paying the board one-third of the purchase price and executing his promissory note for the remaining two-thirds, bearing interest at ten per cent. per annum, payable annually, one of such notes payable in one year, and the other payable in two years from the date of such purchase, shall be entitled to receive from the board a certificate that he has purchased the land therein described, has paid a certain sum thereon, and executed his promissory note for a certain other sum or other sums, and on payment of such notes, principal and interest, will be entitled to a deed therefor.

Sec. 7. When the purchase money is paid, or when such note or notes executed as provided in section 6 of this act, shall be fully paid, principal and interest, such purchaser shall receive a deed substantially in the following form:

In consideration of —— dollars, paid to the board of commissioners for the sale of school, university and other State lands, the State of Oregon does hereby grant, bargain, sell and convey unto —— his —— the following described lands, to-wit: (here insert description) to have and to hold the same unto the said ——, his heirs and assigns forever.

Witness the seal of the State affixed this — day of —, 18—.

[L. S.] ....., Governor.
...., Secretary.
....., Treasurer.

Which deed, without acknowledgment, shall be admitted to record, and shall convey to the grantee all the estate which the State had in the land at the date thereof; and the board shall preserve in a bound volume an abstract of all such deeds, with an alphabetical index of the names of such grantees, and such abstract shall be primary evidence of such conveyance.

Sec. 8. When the application is for the purchase of swamp or tide lands, the purchaser, upon paying the purchase price in full, shall receive a conveyance therefor, substantially in the form specified in the preceding section, which shall operate to convey all the title the State had at the date thereof, abstracts from which shall be preserved in the same manner prescribed in section 7 of this act, and shall be primary evidence of such conveyance.

Sec. 9. All applications for the purchase of swamp and overflowed lands or tide lands, made previous to the passage of this Act, which have not been regularly made in accordance with law, or which were regularly made, and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever.

Sec. 10. Where such applications for the purchase of swamp and overflowed lands have been regularly made prior to the passage of this Act, and the terms and conditions of the law under which they were made have been fully complied with, including the payment of the twenty per centum of the purchase price, such applicants shall, on the payment of two dollars and fifty cents per acre for such lands, at any time prior to January 1, 1880, receive a conveyance therefor from the board of commissioners without proof of reclamation as required by the act for the sale of swamp and overflowed lands, approved October 26, 1870; but such conveyance shall simply convey whatever title the State has in such lands, and shall be substantially in the same form as provided in Section 7 of this Act, and an abstract thereof shall be preserved in like manner. In case such applicant refuse to purchase the entire tract applied for, they shall only be permitted to purchase three hundred and twenty acres as provided in this act.

* * * * *

Sec. 14. The commissioners may make rules for the transaction of business under this act; and shall meet on the second and fourth Tuesdays of each month, to pass upon all applications to purchase lands under the provisions of this act;

hear and decide all questions about priority of settlement and other disputes between applicants; and all their acts and decisions as to the legal title shall be final as to the right to a deed from the State. All necessary expenses for books, maps, blanks, stationery, postage and other incidental expenses, shall be audited upon proper vouchers and paid out of the general fund.

* * * * *

Sec. 19. The right of the State to all swamp and overflowed lands within the State of Oregon, held under the Act of Congress, approved March 12, 1860, in possession of or claimed by any actual settler in good faith under the pre-emption or homestead laws of the United States, before the same was segregated and selected as swamp or overflowed land by the authorities of said State of Oregon, under the provisions of the Act approved October 26, 1870, and such selection confirmed or provided by the laws of the United States, and before such land was claimed by any lawful claimant, under the swamp land law of Oregon, shall be, and the same are hereby granted, released and confirmed unto said settlers respectively occupying and claiming as aforesaid any portions of swamp or overflowed lands.

Sec. 20. Upon request of any settler or claimant as aforesaid, and upon his presenting evidence satisfactory to the board of land commissioners of his claim or possession as aforesaid, the board shall, without fee or charge to such settler or claimant, issue to him a quit claim deed, conveying all rights, title and interest of the State in and to such lands claimed and occupied by him as aforesaid.

* * * * *

Sec. 34. That all of chapter 29 of Miscellaneous Laws of Oregon, except Title 3 thereof, as com-

piled by Matthew P. Deady and Lafayette Lane, an Act to amend an Act entitled "an Act to provide for the sale of school lands and the management of the common school fund," approved October 26, 1874; an Act to amend an Act entitled "an Act to provide for the sale of tide and overflowed lands on the seashore and coast," approved October 27, 1864; an Act requiring local agents of the Board of school land commisiioners to give bonds for the security of public school fueds in their hands, and requiring reports thereon, approved October 20, 1876, and an Act to amend an act entitled "an act to amend an act to provide for the sale of tide and overflowed lands on the seashore and coast," approved October 21, 1876; and all other acts and parts of acts inconsistent with any of the provisions of this act, be and are hereby repealed.

Approved October 18, 1878. *Vide* Session Laws of 1878, pp. 41, 42, 43, 44, 45, 46, 47, 49 and 54. This Act took effect on January 17, 1879, that is ninety days after the end of the session for 1878. The Constitution of Oregon, Article IV. § 28, declares that

"No act shall take effect until ninety days from the end of the session at which the same shall have been passed, except in cases of emergency; which emergency shall be declared in the preamble or in the body of the law."

AN ACT to declare void certain certificates of sale and to forfeit certain lands; to authorize the cancellation of such certificates; to direct the repayment of moneys paid thereon; to preserve the rights of settlers on swamp lands; to authorize the institution of suits to cancel conveyances obtained by fraud, and to provide for the issuance of deeds to swamp lands without reclamation.

Be it enacted by the Legislative Assembly of the State of Oregon:

Section 1. That all certificates of sale issued by the board of commissioners for the sale of school and university lands and for the investment of the funds arising therefrom for swamp or over-overflowed lands on which the twenty per centum of the purchase price was not paid prior to January 17, 1879, are hereby declared void and (of) no force and effect whatever; and said board of commissioners is hereby authorized and directed to cancel said certificates of sale.

Sec. 2. All swamp and overflowed lands sold under the provisions of the act approved October 26th, 1870, relating to swamp lands which have not been reclaimed or paid for in accordance with the provisions of said act are hereby declared forfeited and the certificates of sale are declared void, and the said board is authorized to cancel the same, but the provisions of this section shall not apply to actual settlers on lands of 320 acres or less, who have paid their twenty per centum, which settlers may perfect title without reclamation by the payment of the remaining eighty per centum before January 1, 1889.

Sec. 3. Upon surrender of any such void certificates of sale or receipt given for payment of lands sold as swamp or overflowed lands, or if any such certificates of sale be lost or destroyed or beyond the control of the purchaser or his legal representative, then upon submission of the proof of such loss the board shall order the amount paid thereon, or such portion of such amount as shall remain after making the deduction therefrom hereinafter provided for in certain cases, to be repaid to such purchaser or his legal representative, and the Secretary of State shall draw his warrant

for the amount so ordered repaid whenever sufficient funds are in the swamp land fund available for its payment.

Sec. 4. The said board is hereby authorized to cause suits to be instituted in the name of the State to set aside any deed issued by said board upon fraudulent representations. If necessity requires, the board is authorized to employ attorneys to defend the interests of the State or to institute suits for any just cause.

Sec. 5. Any legal applicant to purchase swamp or overflowed lands who had complied with the provisions of an act approved October 26, 1870, entitled an "act providing for the selection and sale of swamp and overflowed lands belonging to the State of Oregon," including the paymant of the twenty per cent. of the purchase price prior to January 17, 1879, shall, without reclamation, upon payment of the balance of the purchase price be entitled to and shall receive a deed for the land; *provided*, that such payment be made prior to January 1, 1889; and, *provided further*, that no deed shall issue to any one person for more than 640 acres; *provided*, said applicant shall first surrender to the board all certificates to him issued or in his hands for any of said swamp lands forfeited by this act; and *further provided*, that no actual settler is in possession of said 640 acres or any portion thereof under the homestead or pre-emption laws of the United States or under a quitclaim deed or other evidence of purchase from such claimant.

Sec. 6. In all sales or conveyances of lands made under the provisions of this act or which shall hereafter be made of swamp lands, an easement of thirty feet on each side of all section lines shall be reserved for a public highway.

Sec. 7. All swamp or overflowed lands reverting to the State under the provisions of this act shall be sold as provided in the act approved October 18, 1878, relating to swamp lands; *provided*, that actual settlers shall have the exclusive right to purchase the lands occupied not exceeding 320 acres to any one person for six months from the approval of this act.

Sec. 8. Any actual settler who shall have purchased prior to February 1, 1887, from the original holder of any certificate, which is by this act declared forfeited, any of the lands mentioned in this act shall upon making to said board satisfactory proof of such purchase, and of settlement and improvement of such lands, be entitled to a deed to the land not exceeding 640 acres, to be selected in not more than two tracts, and the board shall ascertain the amount paid by such settler to the original swamp land claimant. When such amount is so ascertained the board shall charge said amount to said original swamp land claimant, and shall deduct the same from any moneys paid by such original swamp land claimant for any lands by this act declared void.

Sec. 9. Inasmuch as there is urgent necessity for the passage of this act to settle the rights of applicants to purchase the swamp and overflowed lands belonging to this State, and to protect the State title thereto, this act shall take effect and be in force from and after its approval by the Governor.

Approved February 16, 1887. *Vide* Session Laws of 1887, pages 9, 10 and 11.

POINTS AND AUTHORITIES.

Two important and controlling questions are presented for discussion and decision in this case. The first (I) is whether Owen ever had any such contract with the State of Oregon in relation to the swamp and overflowed lands in controversy as is protected by the constitutional provision prohibiting a State from passing any law impairing the obligation of contracts, and

Second (II) is not this suit, in substance and effect, one against the State and therefore prohibited by the eleventh amendment to the Constitution.

I.

In order to arrive at a correct conclusion in relation to the first question it will be necessary to consider with some degree of particularity the legislation of the State of Oregon in the matter of the sale and disposal of the swamp and overflowed lands which were granted to it by the Act of Congress of March 12, 1860.

The Act of the Legislative Assembly of Oregon providing for the selection and sale of the swamp and overflowed lands belonging to the State, which was passed and took effect October 26, 1870, pointed out the manner in which the selections should be made and provided for the giving of

By the Act of 1878 a new method of disposing of the public lands of the State was established. Restrictions were placed upon the quantities of land to be purchased by any one applicant, the purchase price was changed and protection was afforded actual settlers.

With the repeal of the Act of 1870 Owen's mere naked application to purchase the lands in controversy was bereft of all legal life. No subsuquent act on his part of whatever nature could restore it. Payment of the twenty per centum, at the the times averred in the amended Bill, gave him no right whatsoever to any of the lands and the acceptance of the twenty per centum, by the board of land commissioners was without authority of law and did not bind the State.

It is common learning that the authority of a public agent depends on the law as it is when he acts. He has only such powers as are specifically granted and cannot bind the public under powers that have been taken away.

Anthony vs. *County of Jasper*, 101 U. S., 693.

Coler vs. *Cleburne*, 131 U. S., 173.

Furthermore, as if to place this matter beyond all contention, Section 9 of the Act of 1878 declared that

"All applications for the purchase of swamp and overflowed lands, or tide lands, made previons to the passage of this Act, which have

not been regularly made in accordance with law, or which were regularly made and the applicants have not fully complied with the terms and requirements of the law under which they were made, including the payment of the twenty per centum of the purchase price, are hereby declared void and of no force or effect whatever."

The effect of this section was, as we contend, to require payment by Owen of the twenty per centum prior to January 19, 1879, the date when the Act took effect. Nor does this construction of the section render it unconstitutional, as impairing the obligation of any contract, which Owen had with the State, for the very obvious reason that he had acquired no vested rights under the alleged contract.

It is only vested rights growing out of contracts or growing out of transactions in the nature of contracts authorized by statute, that are protected by the Constitutional provision invoked by the appellee. And the right must be so far perfected as that nothing remains to be done by the party asserting it. Then only is it that the repeal of the statute does not affect the right. Then only is it that it becomes a vested right which stands independently of the statute. And so this Court decided in

Steamship Company vs. *Joliffe*, 2 Wallace, 450.

It was claimed in the Court below and will doubtless be contended here, that if the construction of section nine which we insist upon should be adopted, the section would be unconstitutional. This contention is based upon the theory, that the application of Owen to purchase created a contract and that he had ninety days after the date of the public notice provided for in Section 2 of the Act of 1870, within which to pay the twenty per centum of the purchase price for the lands covered by his application. In this connection it will be observed that the amended Bill does not state that any notice was ever published by the State under the provisions of Section 2 of the Act of 1870, but simply alleges that payment of the twenty per centum was made on November 23, 1881 and April 3, 1884 "and prior to the expiration of the ninety days from the date of the public notice provided for in said Act of 1870."

We contend, however, as above stated, that the application to purchase created no contract relations between Owen and the State. The object of the Act of 1870 was to bring about the reclamation of the swamp and overflowed lands within the State and so add to the general prosperity. This is apparent from the provisions of section four. The allegations of the amended bill do not place Owen in the category of those who had made application to purchase and had entered into possession, or of those who had made application to

purchase and had commenced the work of reclamation. It is such persons only who had the right to claim strict compliance with the provisions of said Act in relation to notice.

But if this position is not correct we still contend that the repeal of the Act of 1870, the enactment of the Act of 1878, and especially of section nine thereof, was general legislative notice to Owen that twenty per centum of the purchase price of the lands he had applied for, was required to be paid before the taking effect of the act. The original Act gave him ninety days from the publication of notice in some newspaper. His application to purchase was made before the passage of the Act of October 18, 1878, and as that Act did not take effect until January 19, 1879, he had full ninety days notice and he cannot therefore in equity be heard to complain.

If these positions are sound then Owen never acquired any vested rights in the lands in controversy, the payments made by him gave him none such, the certificates issued to him were unauthorized, McConnaughy could acquire no rights thereunder and the Act of February 16, 1887, declaring said certificates void is not open to any constitutional objection whatsoever.

It is true that the board of land commissioners after the date of the taking effect of the Act of October 1878 and some years before the passage of the Act of February 16, 1887, "in the matter

of the application of H. C. Owen for certificate of purchase of certain swamp lands," held that the Act of 1878 did not apply to a case where the period prescribed by the Act of 1870, for the payment of the twenty per centum had not expired.

This decision was cited in the Court below as authority in support of the positions taken by the appellee's counsel and was treated with respectful consideration, by said Court.

We agree that the rule is that the construction given to a statute by the executive charged with its execution is entitled to respectful consideration and ought not to be lightly overruled.

This construction is obviously erroneous, and in adopting it this Board was forced to ignore the Act of 1878.

With this we submit our first point.

II.

As to the second point we submit that it is apparent from the averments in the amended Bill, that the appellants have no personal interest whatsoever in this controversy. They are sued in their representative capacity as officers of the State. It is alleged that

"Sylvester Pennoyer was and is governor of the State of Oregon; that G. W. McBride was and is the secretary of State of the State of Oregon; and that G. W. Webb was and is the treasurer of the State of Oregon; and that said three officers

comprise the board of land commissioners for the sale of school and university lands under the laws of said State."

Why this allegation if they are sued as mere private persons threatening to interfere in some way with the rights of the appellee? No personal act on the part of either of them could in any way effect his alleged rights or in the most remote degree affect the title to the land in controversy. No deed to any of the lands in controversy, executed by Sylvester Pennoyer, G. W. McBride, and G. W. Webb, as private individuals, could affect the title thereto. It is only when they do some act or execute some deed in the name of the State as its officers, agents or representatives, that they can affect the title to said lands. Hence we claim that the State is in a substantive sense the actual party defendant and the State being within the constitutional exemption guaranteed by the Eleventh Amendment, the Court below did not have jurisdiction. This principle was decided

In Re Ayres, 123 U. S., 443, *et seq.*

in which it was distinctly held that where a bill in equity is brought against the officers and agents of a State, the nominal defendants having no personal interest in the subject matter of the suit, and such bill is for an injunction against such officers and agents to restrain and enjoin them from acts which it is alleged they threaten to do, in pursu-

ance of a statute of the State, in its name and for its use and which if done would constitute a breach on the part of the State, of an alleged contract between it and the complainants, is a suit against the State within the meaning of the Eleventh Amendment, although the State may not be named as a party defendant.

The amended bill is not directed against the threatened acts of mere personal trespassers who seek to justify under an unconstitutional law, but against State officers clothed by the Constitution of the State with executive powers, seeking to carry out a statute of the State in the name of the State.

The question as to what is and what is not a suit against a State, within the meaning of the Eleventh Amendment to the Constitution, has been so frequently and so fully discussed before this Court and so many decisions in relation thereto have been made within the last decade, that further argument of the question as presented by this case seems unnecessary.

Having met with no decision which contravenes the principle which we cite from *In re* Ayres we confidently rely thereon as sustaining our second point.

For the reasons stated we respectfully urge that the decree of the Court below should be reversed and the amended Bill dismissed.

Respectfully submitted,

LEWIS L. McARTHUR,
Solicitor for Appellants.

H. H. NORTHUP,
Of Counsel.

Supreme Court U. S.
FILED,
DEC 24 1890
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1280.

SYLVESTER PENNOYER, G. W. McBRIDE AND G. W. WEBB APPELLANTS,

vs.

R. F. McCONNAUGHY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

ARGUMENT IN BEHALF OF R. F. McCONNAUGHY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1280.

SYLVESTER PENNOYER, G. W. McBRIDE AND G. W. WEBB APPELLANTS,

vs.

R. F. McCONNAUGHY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

This is a suit by R. F. McConnaughy, a citizen of the State of California, against Sylvester Pennoyer, Geo. W. McBride, and Geo. W. Webb, citizens of Oregon, and comprising the Board of Land Commissioners for the State of Oregon, to restrain them from selling and issuing deeds as of conveyance, to certain lands heretofore sold by the State of Oregon to the grantor of McConnaughy, and now owned by McConnaughy and in his possession.

The lands in question are a part of the Swamp Land Grant made to the State of Oregon by act of Cougress of March 12, 1860 (12 Stat. 3), and heretofore certified to the State as Swamp by the Secretary of the Interior.

On October 26, 1870, the Legislature of Oregon passed an act providing for the selection and sale of this land. That portion of this act material to this case is as follows:

"SECTION 1. It shall be the duty of the Commissioner of Lands to appoint a suitable person or persons as his deputies to proceed, as soon as practicable, to select in the field all the lands rendered unfit for cultivation by inundation or overflow within this State, and to make return of the same to said Commissioner. And it shall be the duty of such deputies to describe such tract or swamp or overflowed land they may select in a clear and distinct manner, either by legal subdivisions or by actual survey, and upon the receipt of such returns it shall be the duty of said Commissioners to fully examine the same."

"SEC. 2. So soon as the selection of swamp and overflowed lands in any county has been completed by said Commissioner of Lands, it shall be the duty of said Commissioner to make out maps and descriptions thereof in duplicate, one copy to be kept in suitable books in his office, and the other to be filed in the office of the County Clerk of the county in which such swamp lands may be located; and it shall be the duty of such County Clerk to forward his official certificate to said Commissioner of the date on which said maps and descriptions were so filed. Upon the receipt of such certificate it shall be the duty of said Commissioner to give public notice of said completion, approval and filing for four weeks successively in some weekly newspaper published in such county; and if no newspaper is published in such county, then in such newspaper as he may select in an adjoining county."

"SEC. 3. The swamp and overflowed lands of this State shall be sold by said Commissioner at a price not less than one dollar per acre in gold coin. Any person over the age of twenty-one years, and being a citizen of the United States, or having filed his declaration to become a citizen, as required by the naturalization laws, may become an applicant for the purchase of any tract or tracts of said swamp and overflowed lands, upon filing his application therefor, describing the tract or tracts he desires to purchase; by the actual survey; or, if no survey has been made, then by fences, ditches, monuments or other artificial or natural land marks, with said Commissioner, whose duty it shall be to immediately endorse thereon the actual date of such filing. In case of adverse applicants for the same tract or parcel of swamp land, it shall be the duty of said Commissioner to sell the same to the legal applicant therefor whose application is first filed. Within ninety days after the date of the public notice provided for in section 2 of this act, 20 per centum of the purchase money shall be paid by the applicant to said Commissioner, whose duty it shall be to issue to the applicant a receipt therfore, and the balance of said purchase money shall be paid on proof of reclamation, as hereinafter provided."

"SEC. 4. No patent shall be issued to any applicant for any swamp or overflowed lands until the applicant therefor has proved, to the satisfaction of said Commissioner, that the land for which he claims a patent has been drained or otherwise made fit for cultivation; but upon such proof being made, and payment of the balance of the purchase money on the amount of land actually reclaimed, the said Commissioner shall issue to the applicant making such proof and payment, a patent for the land so reclaimed. Said patent shall be approved and signed by the Governor, Secretary of State and State Treasurer, as

provided for by the Constitution. At the expiration of ten years from and after his first payment, all swamp lands claimed by an applicant, upon which no such proof of reclamation and payment has been made, shall revert to the State, and the money paid thereon shall be forfeited: Provided, That all swamp land which has been successfully cultivated in either grass, the cereals or vegetables for three years, shall be considered as fully reclaimed within the meaning of this act."

* * * * * *

"SEC. 6. As the State is likely to suffer loss by further delay in taking possession of the swamp lands within its limits, this act shall take effect and be in force from and after its approval by the Governor: Provided, That in case the office of commissioner of lands is not created by law, the provisions of this act shall be executed by the Board of Commissioners for the sale of school and university lands."

Session Laws 1870, page 54.

Prior to this act, and in 1862, the Legislature had appointed the Governor of Oregon, land commissioner to locate all the lands to which the State was entitled under the various grants of Congress, including the swamp land grant.

Deady's Code of 1872, Laws of Oregon, 629.

It thus became the duty of the Governor, under the provisions of these two acts, to select the swamp lands of the State by means of deputies; maps and descriptions of which selections for each county were required to be made in duplicate, and filed, etc., and four weeks' notice thereof given. Within ninety days after this notice the swamp land filer was required to make payment of 20 per cent of his purchase. Under this law and prior to the selections and notice provided for, one Owen filed upon the land in question, comprising about 43,000 acres.

On the 18th day of October, 1878, the Legislature passed a further act, which took effect, by operation of the Constitution, ninety days thereafter, among other things limiting the number of acres of swamp land that might be purchased by one person, and authorizing sales to be made without proof of reclamation in certain cases. By this act the Governor was appointed Land Commissioner, with power to *locate* all State Lands, a power which he already had under the act of 1862. This act of 1878 contained the following provisions:

"SEC. 9. All applications for the purchase of swamp and overflowed lands or tide lands made previous to the passage of this act which have not been regularly made in accordance with law, or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made,

including the payment of the 20 per centum of the purchase price, are hereby declared void and of no force or effect whatever."

* * * * * *

"SEC. 11. All assignments of certificates of sale shall be executed and acknowledged in the same manner as a deed to real estate; and the assignee, upon full payment of the amount due on the purchase price and delivery to the Board such certificates and assignment, shall receive a deed for the lands described in such certificate, in his own name as if he were the original purchaser."

Session Laws 1878, page 46.

On the 23d day of November, 1881, and on April 3d, 1884, and prior to the expiration of the ninety days from the date of the public notice provided for in the act of 1870, Owen duly paid to the Board of Land Commissioners, the 20 per centum on all the lands in question. The Board accepted such payment and issued to Owen a certificate of sale for all such lands.

In October, 1884 McConnaughy purchased the lands in controversy from C. N. Felton, the assignee of the Owen's certificate and the grantee of Owen's title, paying therefore the sum of $30,000, and assuming to pay the unpaid balance of the purchase price due the State. McConnaughy thereupon went into possession of the lands, and has since had such possession. On October 18, 1887, the Legislature undertook to avoid the contract of the State with Owen, and to forfeit to the State the lands sold thereby, by an act which provided as follows:

"SEC. 1. That all certificates of sale issued by the Board of Commissioners for the sale of school and university lands and for the investment of the funds arising therefrom for swamp or overflowed lands on which the 20 per centum of the purchase price was not paid prior to January 17, 1879 [the day on which the act of 1878 took effect] are hereby declared void and of no force or effect whatever, and said Board of Commissioners is hereby authorized to cancel said certificates of sale."

Session Laws 1887, page 9.

On the 25th day of February, 1890, the appellants, assuming as a Board of Land Commissioners, to give effect to the forfeiture act of 1887, accepted applications made to them to purchase the land in question belonging to McConnaughy, there being "a large number of applications for the purchase" of such lands on file, in the following order:

"In the matter of the application of W. Z. Moss, *et al*, to purchase certain swamp lands in the Warner Lake valley, recently certified to the State by the Secretary of the Interior, in List No. 12, Lakeview

District, it was ordered that the said applications made in pursuance of the act approved Feby. 16, 1887, relating to swamp lands, be accepted, and that deeds be issued to lawful applicants for the lands described therein, as far as the same shall appear in said certified list; provided that no deed shall issue to any person but an actual settler till after the expiration of ninety days from the time said list was filed with the Clerk of the Board."

In April following, the appellants sold one thousand acres of this land belonging to McConnaughy and issued deeds in the name of the Board therefor. The bill of complaint alleges these facts, and it alleges that at the expiration of the ninety days provided for in the order, the appellants will sell all of McConnaughy's said land, and will issue deeds therefor as the deeds of the State, thus creating a cloud on McConnaughy's title and involving him in a multiplicity of suits, and that the land for which applications to purchase have been thus accepted by the appellants, and which they are thus offering for sale, are of the value of $50,000.

The appellants demurred to the complaint. The demurrer was overruled and a decree rendered enjoining the appellants from selling the said lands of McConnaughy or from issuing deeds thereto for and in behalf of the State of Oregon, or as the act of the Board of Land Commissioners of the State.

The demurrer presents two questions:

Has McConnaughy title or right in the land in question, notwithstanding the acts of the Legislature of Oregon of 1878 and 1887, and, having such title, is this a suit against the State of Oregon, and therefore forbidden by the eleventh amendment to the Constitution of the United States?

Owen, through whom McConnaughy derives title, made application to purchase the land in question prior to the Act of 1878. He did not pay the 20 per centum of the purchase price until after the Act had taken effect, but he was not required to do so and was not in default. At the date of the going into effect of that act, he had, therefore, a contract with the State which the Legislature could not impair. The act of 1878 did not, however, undertake to affect Owen's filings. That act declared void all applications to purchase where the applicants "have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the 20 per centum." Session Laws 1878, page 40. Under this law, the

failure to pay the 20 per centum could only be a ground of forfeiture, where such failure was a failure to comply with the requirements of the act of 1870, where the non-payment had been a violation of the conditions of the act of 1870. It did not apply to cases where the payment was not yet required under the act. Under the act of 1870, this payment was required only within ninety days of the published notice by the Board, of the selection by the Land Commissioner of the land filed upon. *McConnaughy* vs. *Willey*, 33 Fed. Rep. 451. The forfeiture declared by the act of 1878 is where the applicants have not "fully complied" with the requirements of the act of 1870, "including the payment of the 20 per centum of the purchase price." Appellants concede that the payment of the 20 per centum prior to the act of 1878 would be a full compliance with the act of 1870. But this is impossible under the construction given by them to the amendatory act. The payment of this moiety of the purchase price can only be a "full performance" upon the theory that the payment of the residue is not yet required by the terms of the act under which the application to purchase was made—in other words, that the applicant who has not made default has fully complied with the law, although his agreement has not been fully executed. If, therefore, an applicant to purchase, who has not made proof of reclamation and final payment is within the saving clause of having "fully complied," for the reason that the time had not arrived when peformance of these conditions were required of him, it follows that an applicant who has not, for the same reason, made his first payment is within the same exemption.

*The repeal by the act of 1878 of the provisions of the act of 1870 does not affect the question. If it is conceded, as it is not, that the Legislature could forfeit Owen's rights by a repeal of the law under which those rights were acquired, the expressions in the repealing act, which show that such was not the intention, will prevent that result. The appellants contend that inasmuch as the provisions of the old law providing for the publication of notice of swamp land selections and for the payment of 20 per centun within ninety days thereof were repealed by the act of 1878, it follows that if this did not forfeit Owen's right, at least his obligation, to pay the 20 per centum was somehow changed and that the payments thereafter made gave him no right.

---

* The statement in the opinion of the Circuit Court, that the act of 1870 was *not* included in the repeal of the act of 1878, is probably due to a mistake in copying the opinion. The fact that the provisions of the former act were repealed by the later one was not questioned upon either hearing had in the case, and was understood by the court.

But why should the repeal thus effect the first payment and not effect the right of applicants to make proof of reclamation and final payment within ten years? The law relating to reclamation and final payment was also repealed, and yet the appellants do not question but that swamp land applicants whose first payment was made prior to the amendatory act could go on and complete their title precisely as though there had been no repeal, and it has been the uniform practice of the Board to permit this. The amended law made no new or different provision for payments by applicants under the old law, whose applications were not declared void. It provided no new conditions to take the place of those claimed to have been abrogated by the repeal. The rights of these applicants were recognized and preserved. This is clear. What were those rights? Necessarily they were such rights as the applicant had when the new law was passed. They could only be ascertained by a reference to the old law. If we take the case of an applicant who has paid his 20 per centum prior to 1878, the force of these considerations will be more apparent. Such an applicant, it is admitted, had the right upon proof of reclamation and final payment within ten years to a patent. The act of 1878 repealed the provisions relating to reclamation and payment within ten years, and substituted nothing in their stead. When, and upon what conditions can such an applicant secure his patent? The Board of Land Commissioners met the question by holding that while the law had been repealed the Legislature had reserved its agreements with all swamp land applicants not in default. In other words, that the State in repealing its law had not intended to repeal its contracts made in pursuance of the law. And so the board now holds. The appellants when sitting as a board apply the provisions of the old law as to proof of reclamation and the payment of the eighty cents within ten years, precisely as though those provisions had not been repealed, in all cases where the first payment was made prior to the act of 1878. The contention is solely as to whether payment of the 20 per centum prior to the act of 1878, is necessary in order to preserve the rights of the applicant, although the time had not then arrived when such payment was required. The Board of Oregon Land Commissioners decided that the act of 1878 did not apply to cases where the period prescribed by the act of 1870 for the payment of the 20 per centum had not arrived. There is no law authorizing the publication of opinions and rulings of the Board, but the opinion mentioned is referred to in the opinion of the Circuit Court herein. The case was one of contest between Owen and one Ish, in which, among other things, it was contended by Ish, as appellants

now contend, that Owen's right had become forfeited under the act of 1878, for non-payment of the 20 per cent. prior to the passage of that act. The opinion of the Board in the decision of that question is as follows:

"The act of 1878 does not, however, attempt to interfere with applicants who had complied with the law of 1870. Section 9 of that act provides that 'all applications for the purchase of swamp land made previous to the passage of this act (act of 1878) which have not been regularly made in accordance with law, or which were regularly made and the applicants have not fully complied with all the terms and requirements of the law under which they were made, including the payment of the 20 per centum of the purchase price, are hereby declared void and of no force or effect whatever. A strict construction of this language might have the effect to forfeit all applications where the 20 per centum had not been paid, although the applicant had fully complied with the law as far as the circumstances would admit of a compliance. We have had occasion to consider that question frequently, and have concluded that it ought not receive that construction. The Legislature may have had the power to suspend every application of that character and delare it a nullity, but we do not think it so intended, that it only intended to declare void those applications where the non-payment of the 20 per centum had been a violation of the condition contained in the act of October 26, 1870. In many cases the applicant to purchase under the latter act was not in default when it was repealed, although he had not paid the 20 per centum purchase price, as the circumstances had not arisen or the time elapsed requiring its payment."

The Board is charged with the execution of the laws in question. Its decision became the established rule until the law of 1887 was passed, and for a period of nearly ten years has not been questioned.

As already stated, the Board, so interpreting this law, received from Owen the 20 per centum of the purchase price of the land in question, and issued its certificate of sale therefor. This payment was made and accepted within the terms of the act of 1870.

The presumption is against a retroactive operation of statutes.

Endlich on Int. Stat., § 271.

The rule chiefly prevails where the enactment would prejudicially affect vested rights or the legal character of past transactions. Ib. § 273.

Contemporary authority is the best exposition of a statute and the long acquiescence of the Legislature in the construction put upon a statute, is a sanction and approval of such construction. *Ib.*, 357, 358.

Where the construction of an act is doubtful, one long acted upon by the inferior courts will generally be adopted by the Supreme Tri-

bunal—but of almost equal dignity is the practical construction put upon an act by the governmental officers particularly charged with its execution. Thus the construction of a statute adopted and acted upon by the executive, in the execution of his duty to give effect to the laws, or by the Secretary of the Treasury, will in case of doubt and ambiguity be adopted by the Courts. *Ib.*, 360.

United States v. *Moore*, 95 U. S., 763.

Brown v. *United States*, 113 U. S., 568.

The Laura 114 U. S., 416.

Scanlon v. *Childs*, 33 Wis., 665.

Westbrook v. *Miller*, 56. Mich., 151.

In United States *v.* Moore, the Court says: "the construction given to a statute by those charged with the duty of executing it * * * ought not to be overruled without cogent reasons * * * The officers concerned are usually able men and masters of the subject. Not unfrequently they are the draftsmen of the laws they are afterwards called upon to interpret."

It is common knowledge that the Chairman of the Board of Land Commissioners, when this construction was put upon the act of 1878, was Governor Thayer, subsequently and until recently Chief Justice of the Supreme Court of the State.

But admitting, for the sake of argument, that after the passage of the act of 1878, the Board was not required to give the ninety days published notice provided for in the act of 1870, how can it be said that Owen was in default in making the payments alleged in the bill? If the published notice was no longer required, then there was no requirement as to when such payment should be made. The Board in such case might make any reasonable regulation to govern such cases. Can it be said that a regulation that conformed to the pre-existing requirements was unlawful? Suppose the allegation in the bill that Owen paid the 20 per centum within ninety days of the published notice of the making of the selections, be rejected altogether, leaving it to appear that these payments were made at the dates alleged; that they were accepted by the Board and that certificates of sale were issued in consideration of them, is this not enough to vest title in Owen? The provision in the act of 1870 providing for the selection of swamp lands was retained in the act of 1878. Could not the Board provide for such payments by those not in default, to be made after these selections were made? It was not the policy of the State to

accept payments on lands as swamp which it had not yet selected or claimed as such. It was a reasonable regulation to provide that the State would receive payments after it had made the selections and given notice of the fact to the applicants. These acts or regulations of the Board were not in violation of any law, unless it is assumed that the act of 1878 intended to avoid all existing applications which, as has been shown, is clearly not the case and is not claimed to be the case, and that it had the power so to do. The act of 1878 authorizes the Commissioners to make rules for the transaction of business under the act, to decide disputes between conflicting applications, and it provides that their decisions as to the legal title shall be final as to the right to a deed from the State.

Laws of 1878, Sec. 14, page 47.

Under a similar provision it is held that the decision of the Board is final so far as the interest of the State is concerned. *Hurst* v. *Hawn*, 5 Or., 276. And it is also held in a swamp land case that under the Constitution of Oregon the Board is a co-ordinate branch of the State government, whose discretion and decisions the Courts cannot control.

Corpe v *Brooks*, 8 Or. 222.

In *Wattier* v. *Miller*, 11 Or., 331, it is held that the certificate of sale of swamp land by the State upon the payment of the 20 per cent. conveys a present interest in the land. A right to possession follows the certificate. This interest is a certificate title. It is the subject of sale and transfer under the swamp land act. § 11 Laws of 1878, p. 46.

Section 1 of the act of 1887, undertakes to declare void and cancel certificates of sale where the 20 per centum was not paid prior to January 17, 1879, the date when the act of 1878 took effect. This act attempts to abrogate the contracts of the State for the sale of these lands upon the assumption that the act of 1878 operated to forfeit the rights of applicants to purchase where there had not been a prior payment of the 20 per centum. It attempts to cancel McConnaughy's certificate title to all the lands in question.

McConnaughy contends that the act of 1887 is void, as impairing the obligations of his contract with the State, and that the acts of the appellants are a wanton invasion of his title and rights under that contract.

The immunity from suit secured to the States by the eleventh amendment to the Constitution of the United States, does not exempt the State from the operation of the Constitutional provision that no State shall pass any law impairing the obligation of contracts.

Poindexter v. *Greenhow*, 114 U. S., 286.

It is true no action can be maintained to compel performance of a contract with the State or to recover damages for its breach. "But it is equally true that wherever, in a controversy between parties to a suit, of which these Courts have jurisdiction, the question arises upon the validity of a law by a State, impairing the obligation of its contract, the jurisdiction is not thereby ousted, but must be exercised, with whatever legal consequences to the rights of the litigants, may be the result of the determination." *Ib.*

Where the officers of the State are sued to prevent the impairment of contract rights under the authority of a void law of the State, they are not sued as officers, and the jurisdiction is not ousted because they assert authority as such officers. *Ib.* 287, 298.

To make out the defense that the appellants are sued as or because they are officers of the State, they must show that their authority is sufficient in law to protect them.

Cunningham v *Macon etc., R. R. Co.*, 109 U. S., 452.

In conformity with these principles, the preventive remedy of injunction lies to protect a party in the immunity to which he is entitled by virtue of a contract with the State, secure against State laws impairing its obligation by the Constitution of the United States.

Allen v. *Railroad Company*, 114 U. S., 311.

These principles are applied in the recent Virginia coupon cases decided in this Court, McGahey *v.* Virginia, 135 U. S., 662. The doctrine is therefore firmly established that while no proceedings can be instituted against a State, either directly against it by name, or indirectly against its officers, "to control them in the exercise of official functions," yet where an officer of a State, wrongfully asserts its authority to molest the person or property of another, the Courts of the United States have jurisdiction to grant redress by suit to recover the property taken "by suit against the officer to recover damages for taking it" or "by injunction to prevent such taking where it would be attended with irremediable injury." *Ib.*, 684.

In this case the appellants are not exercising any official function in the acts complained of. There is no law authorizing them to sell and

convey the 43,000 acres of land heretofore sold by the State to McConnaughy's grantor, or to cancel the certificates of sales heretofore issued for such land. The pretended law to that effect is without the power of the State and a nullity. The offer by them of all this land for sale, their acceptance of the applications to purchase the same and their threatened cancellation of McConnaughy's certificates of title is a wrongful assertion of the authority of the State, and if permitted, McConnaughy will be without any adequate remedy. Under the laws of Oregon, the only record of swamp land certificates is kept by the Board. Laws 1878, § 12, page 47. The cancellation of McConnaughy's certificates of sale by the appellants, under an assumption of official authority, will have the effect of destroying his record title, and the issuance of the deeds by the appellants will result in vesting the apparent title to all these lands in a great number of persons, probably widely scattered about the country. It must of necessity involve McConnaughy in a great multiplicity of suits, and a tedious and expensive inquiry into extrinsic facts, to establish his right against these apparent titles. In this connection it must not be overlooked that, in addition to the allegation that a great number of persons have applied to purchase these lands, the existing law limits the number of acres that may be sold to any one person to 320 acres. Session Laws 1878, page 42. The claimants under the pretended sales and conveyances complained of must, therefore, of necessity embrace a large number of persons. The injury to McConnaughy's rights, for which the preventive remedy of injunction is prayed, is not less than that for which this remedy was allowed in Allen *v.* Baltimore & Ohio Railroad Co.

Respectfully submitted,

C. A. DOLPH,

C. B. BELLINGER,

Solicitors for R. F. McConnaughy.